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No. 96-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

NYNEX CORPORATION, NYNEX MATERIEL ENTERPRISES COMPANY, and NEW YORK TELEPHONE COMPANY,

Petitioners,

v.

DISCON INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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April 3, 1997

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Questions Presented

When a Purchaser agrees to buy from Supplier A rather than Supplier B, and there is no issue of any horizontal restraints or vertical price restraints:

1. May the agreement between Purchaser and Supplier A be characterized as a group boycott in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1?

2. May the agreement between Purchaser and Supplier A be characterized as a conspiracy to monopolize in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2?

Parties to the Proceeding Below

The parties to the proceeding in the Court of Appeals were respondent Discon Incorporated, as plaintiff-appellant; petitioners NYNEX Corporation, NYNEX Materiel Enterprises Company, and New York Telephone Company, as defendants-appellees; and two defendants-appellees who are no longer parties to the case, Robert J. Eckenrode and Bernard O'Reilly. Mr. Eckenrode and Mr. O'Reilly were not named as defendants in the Sherman Act § 1 and § 2 claims, and all of the claims in which they were named as defendants have been dismissed.

Pursuant to Supreme Court Rule 29.6, petitioners state that petitioner NYNEX Corporation has no parent company, and that it is the direct or indirect parent company of petitioners New York Telephone Company and NYNEX Materiel Enterprises Company. Petitioners New York Telephone Company and NYNEX Materiel Enterprises Company have no nonwholly owned subsidiaries. Petitioner NYNEX Corporation has direct and indirect interests in the following nonwholly owned entities:

Associated Venture Investors III, L.P.
BANX Partnership
Bayan Telecommunications Holding Corporation
Bell Atlantic NYNEX Mobile, Inc.
Bell Communications Research, Inc.
Cable Programme Partners-1 Limited Partnership
CAI Wireless Systems, Inc.
Cellco Partnership d/b/a Bell Atlantic NYNEX Mobile
Chartwell Investors L.P.
FLAG Limited
Gibraltar NYNEX Communications Limited
Kipling Associates L.L.C.

London Interconnect Limited
Mediatel spol. s.r.o.
New York SMSA Limited Partnership
North CableComms L.L.C.
Nusantara Communications Consortium
NYNEX CableComms Group Inc.
NYNEX CableComms Group PLC
NYNEX International (Asia) Ltd
NYNEX International Media Company
NYNEX Master Lease Partners
NYNEX Worldwide Directories Company
Polskie Ksiazki Telefoniczne
PrimeCo Personal Communications, L.P.
P.T. Excelcomindo Pratama
Roxbury Corners Limited Partnership
South CableComms L.L.C.
STET Hellas Telecommunications S.A.
TelecomAsia Corporation Public Company Limited
TELE-TV
TELE-TV Media, L.P.
TELE-TV Systems, L.P.
The Messaging Alliance, L.P.
The Parliamentary Channel Limited
TOMCOM, L.P.
Tuka Cellular Tokai K.K.
Tuka Cellular Tokyo K.K.
Tuka Phone Kansai K.K.
Viacom, Inc.
Winston Investors L.L.C.
Zlate Stranky Mediatel spol. s.r.o.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit (Chief Judge Newman and Circuit Judges Oakes and Parker), which reversed the dismissal of plaintiff's amended complaint by the United States District Court for the Western District of New York (Honorable Richard J. Arcara, U.S.D.J.). The Second Circuit reversed on the basis of two novel theories under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, which are in conflict with decisions of other circuits and of this Court.

For the reasons set forth below, petitioners respectfully suggest that the Court should grant a writ of certiorari and summarily reverse the judgment of the court below on the ground that it is contrary to this Court's decision in *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717

(1988). In the alternative, the Court should grant a writ of certiorari and set the case down for briefing and argument. The court below acknowledged that its decision created a conflict among circuits as to whether a single firm's decision to purchase from one supplier rather than another can properly be characterized as a "boycott" for antitrust purposes. The decision below, which in fact conflicts with decisions from more circuits than the court below recognized, will lead to significant litigation and business uncertainty unless it is reviewed and reversed by this Court.

Opinions Below

The opinion of the Court of Appeals is reported at 93 F.3d 1055, and is set forth in the Appendix (1a-20a). The order of the Court of Appeals denying rehearing and rehearing in banc is not reported, and is set forth in the Appendix (54a-55a). The opinion of the District Court is not reported, and is set forth in the Appendix (21a-53a).

Jurisdiction

The judgment of the Court of Appeals was entered on August 26, 1996. Petitioners' timely petition for rehearing and suggestion for rehearing in banc was denied by the Court of Appeals on January 7, 1997 (54a-55a). The jurisdiction of this Court to review the judgment of the Court of Appeals by writ of certiorari is conferred by 28 U.S.C. §§ 1254(1), 2101(c).

Statutes Involved

Section 1 of the Sherman Act, 15 U.S.C. § 1, reads as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

Section 2 of the Sherman Act, 15 U.S.C. § 2, reads as follows:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

Statement of the Case

A. Background

Plaintiff Discon Incorporated ("Discon") was a supplier of equipment removal services (3a). Defendant NYNEX Corporation ("NYNEX") owned defendant New York Telephone Company ("NYT"), The New England Telephone and Telegraph Company, and other subsidiaries, including defendant NYNEX Materiel Enterprises Company ("MECo"), which served as a purchasing agent for the NYNEX companies (3a-4a).

During the mid-1980s, NYT purchased removal services, either directly or through MECo, from a number of suppliers, including Discon and AT&T Technologies, Inc. (''AT&T Technologies''), an unrelated company which is not named as a defendant herein (4a & n.2, 6a). After July 1985 MECo stopped using Discon, and after May 1986 NYT did so as well (*see* JA128-JA129).[1] Discon alleged that the NYNEX companies transferred their business to AT&T Technologies as part of a scheme to defraud NYT's ratepayers by inflating the prices the NYNEX companies paid for removal services (5a-6a).

B. The Decision of the District Court

Discon's original complaint alleged seven federal antitrust and RICO claims, as well as nine state law claims (JA12-JA61). Federal jurisdiction was based on 15 U.S.C. § 15 and 18 U.S.C. § 1964 (JA14, JA114). The District Court dismissed all of the claims in Discon's original complaint, but granted leave to replead (JA67-JA108).

Discon's amended complaint alleged seven federal antitrust and RICO claims and six state law claims (JA109-JA162). The District Court dismissed the federal claims with prejudice and the state law claims without prejudice (21a-53a).

The District Court held that Discon's Sherman Act § 1 claim should be dismissed, among other reasons, because when a buyer purchases from one supplier rather than another, ''the fact that an agreement between the buyer and the new supplier is necessarily involved does not make it an illegal conspiracy'' (29a, *quoting Nifty Foods Corp.* v. *Great Atl. & Pac. Tea Co.*, 614 F.2d 832, 841 (2d Cir. 1980)).

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1. ''JA'' citations are to the Joint Appendix in the Court of Appeals.

Discon argued that it had alleged a horizontal conspiracy between AT&T Technologies and the NYNEX companies in violation of Sherman Act § 1, but the District Court held that the fact that the NYNEX companies were purchasers of removal services and not competitors of AT&T Technologies in rendering such services was fatal to this theory (28a-29a).

Discon also argued that it had alleged a vertical price-fixing conspiracy in violation of Sherman Act § 1, but the District Court held that Discon had failed to allege an agreement to comply with fixed prices (30a).

The District Court dismissed Discon's Sherman Act § 2 claims, among other reasons, because the NYNEX companies neither provided nor sought to provide removal services, and could not monopolize a market in which they did not participate (32a-38a).

Discon appealed to the Court of Appeals from the dismissal of its federal claims (JA330). Discon did not appeal the dismissal without prejudice of its state law claims, but instead commenced a state court action against NYNEX and NYT.

C. The Decision of the Court of Appeals

The Court of Appeals held that the District Court had properly dismissed Discon's RICO claims (15a-20a), and that the District Court had correctly dismissed Discon's antitrust claims as Discon had articulated them (6a-10a, 13a-14a).

The Court of Appeals rejected Discon's claim of a horizontal conspiracy to restrain trade between AT&T Technologies and the NYNEX companies, holding that under *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 771 (1984), the NYNEX companies must be regarded for antitrust purposes as a single entity purchasing removal services from

AT&T Technologies and others (8a-10a). The Court of Appeals also rejected Discon's claim of vertical price-fixing (10a n.5).

The Court of Appeals went on to say, however, that "we believe that Discon may be able to prevail under a different legal theory" (10a). Although Discon had not cited *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), the Court of Appeals held that the group boycott doctrine of *Klor's* could be "extended . . . to the situation where only a single retailer and a single manufacturer conspire" (11a). The Court of Appeals acknowledged that "such arrangements will often resemble exclusive distributorship agreements, which are generally considered permissible under the rule of reason," and stated that "*in general*, two-firm vertical combinations will be scrutinized as exclusive distributorship controversies, rather than as group boycotts" (12a; emphasis in original). However, the Court of Appeals held that the present case could be characterized as a group boycott because, it said, "no . . . pro-competitive rationale appears on the face of the complaint" (12a).

The Court of Appeals affirmed the dismissal of Discon's claims of monopolization and attempt to monopolize under Sherman Act § 2, holding that "it is axiomatic that a firm cannot monopolize a market in which it does not compete" and that there was no dangerous probability of success because the NYNEX companies did not compete in the market for removal services and never sought to do so (14a).

Discon's conspiracy to monopolize claim, as pleaded, was based on the theory that the NYNEX companies joined in a conspiracy with AT&T Technologies and others with specific intent to monopolize the market for removal services (JA150). This claim was subject to dismissal for the same

reasons as Discon's monopolization and attempt to monopolize claims.

Once again, the Court of Appeals upheld Discon's conspiracy to monopolize claim on a theory not pleaded by Discon. The Court of Appeals held that a purchaser "may be liable for conspiracy to monopolize where it agrees with [a supplier] to assist [the supplier] in its attempt to monopolize the relevant market" (14a).

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Created a Conflict Among Circuits, and a Direct Conflict With the *Business Electronics* Decision of This Court, by Extending the Group Boycott Rule of *Klor's* to a Two-Firm Supplier-Purchaser Situation.

A key distinction under Section 1 of the Sherman Act is the distinction between horizontal and vertical agreements. A horizontal agreement is an agreement between competitors, and a vertical agreement is an agreement between firms at different levels of distribution. *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717, 730 (1988). This Court has held that a vertical agreement is *per se* illegal only if it restricts the buyer's freedom to set its own prices. *Id.* at 720, 735-36.

The distinction between horizontal and vertical agreements plays a critical role in safeguarding the freedom of a buyer to replace one supplier with another (and *vice versa*), which is the essence of a free competitive economy. In keeping with this distinction, the courts have held that "the decision of the seller to transfer his business from A to B is valid even though B may have solicited the transfer and even though the seller and B may have agreed before the seller terminates his

dealings with A."[2] This rule flows from the fact that the antitrust laws "were enacted for the protection of *competition*, not *competitors*," *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487-88 (1977), *quoting Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962) (emphasis in original), and the fact that the substitution of one buyer or seller for another does not alter the nature of competition. This rule also prevents the antitrust laws from being misused as a means of obtaining judicial review of businesses' decisions to buy from one supplier rather than another *Fastway Constr. Corp.* v. *City of New York*, 762 F.2d 243, 251 (2d Cir. 1985).

In the present case, the Court of Appeals correctly held that the alleged agreement between the NYNEX companies and

2. *Nifty Foods Corp.* v. *Great Atl. & Pac. Tea Co.*, 614 F.2d 832, 841 n.14 (2d Cir. 1980), *quoting Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 78 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970). *See also, e.g., Coastal Transfer Co.* v. *Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 211 (9th Cir. 1987) (no antitrust claim is presented by "the recurrent case of the jilted . . . supplier who loses a manufacturer's franchise and accuses the manufacturer and the new suitor of attempting to monopolize something"); *Great Escape, Inc.* v. *Union City Body Co.*, 791 F.2d 532, 539 (7th Cir. 1986) ("There is no anticompetitive effect when a buyer simply terminates an at-will contract with one supplier and enters into a similar contract with another supplier."); *Dunn & Mavis, Inc.* v. *Nu-Car Driveaway, Inc.*, 691 F.2d 241, 245 (6th Cir. 1982) ("Chrysler's substitution of one auto transport company for another at its Warren plant does not limit competition in any substantial sense."); *Quality Mercury, Inc.* v. *Ford Motor Co.*, 542 F.2d 466, 469 (8th Cir. 1976) ("[A] manufacturer may terminate a distributorship held by one party and transfer it to another without violating the Sherman Act."); *Burdett Sound, Inc.* v. *Altec Corp.*, 515 F.2d 1245, 1249 (5th Cir. 1975) ("Lest any other former distributors succumb to the temptation of treble damages, we reiterate that it is simply not an antitrust violation for a manufacturer to contract with a new distributor, and as a consequence, to terminate his relationship with a former distributor, even if the effect of the new contract is to seriously damage the former distributor's business.").

AT&T Technologies was not a horizontal agreement, because the NYNEX companies did not compete with AT&T Technologies in the rendering of removal services (8a-10a). The Court of Appeals also correctly rejected Discon's claim of vertical price-fixing (10a n.5).

However, the Court of Appeals then reached out to apply *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), a case that had not been cited by Discon. *Klor's* dealt with a horizontal group boycott, in which competing manufacturers and wholesalers allegedly conspired not to deal with a particular customer. The Court of Appeals held that *Klor's* could be applied to a two-firm supplier-purchaser situation like that involved in the present case, even though such a situation involves no horizontal conspiracy among competing firms (11a-12a). The court below cited two cases from other circuits that it believed had extended *Klor's* in this way (11a). It acknowledged, however, that the Eleventh Circuit had refused to extend *Klor's* in this manner (11a-12a). The court below sought to support its extension of *Klor's* by asserting that a vertical agreement may be characterized as a horizontal restraint of trade "if the agreement seeks to disadvantage the direct competitor . . . of one of the conspiring firms" (11a).

In actuality, neither of the cases cited by the Court of Appeals extended *Klor's* to a two-firm supplier-purchaser situation.[3] At least nine other circuits, including the Eleventh

3. *Com-Tel, Inc.* v. *DuKane Corp.*, 669 F.2d 404, 412-13 (6th Cir. 1982), dealt with a boycott conspiracy involving several competing distributors, not a two-firm supplier-purchaser "group boycott." *Cascade Cabinet Co.* v. *Western Cabinet & Millwork Co.*, 710 F.2d 1366, 1372-73 (9th Cir. 1983), did not deal with a two-firm supplier-purchaser situation; moreover, the court distinguished *Klor's* and declined to find a group boycott. The court below also gave a "*see also*" cite (11a) to *Cernuto, Inc.* v. *United Cabinet Corp.*, 595 F.2d 164, 168 (3d Cir. 1979), which was over-

Circuit in the decision cited by the court below, have expressly refused to extend *Klor's* to such situations.[4] Thus the holding of the court below that the group boycott doctrine of *Klor's* can be extended to two-firm supplier-purchaser situations has created a sharp conflict among circuits.

It has also created a direct conflict with the decision of this Court in *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717 (1988). The petitioner in that case argued that a vertical nonprice restraint could be condemned

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ruled by this Court in *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717, 720 n.1 (1988).

4. *See Bailey's, Inc.* v. *Windsor America, Inc.*, 948 F.2d 1018, 1031 (6th Cir. 1991) (no boycott where defendant "entered into no agreement with manufacturers of competing brands" and "did not conspire with resellers that were in competition with one another"); *Lomar Wholesale Grocery, Inc.* v. *Dieter's Gourmet Foods, Inc.*, 824 F.2d 582, 590-91 (8th Cir. 1987) (no boycott where there is no horizontal "collusion between competitors on the same market level"); *Westman Commission Co.* v. *Hobart Int'l, Inc.*, 796 F.2d 1216, 1224 n.1 (10th Cir. 1986) ("For a group boycott to exist, there must be an agreement among conspirators whose market positions are horizontal to each other."), *cert. denied*, 486 U.S. 1005 (1988); *Terry's Floor Fashions, Inc.* v. *Burlington Indus., Inc.*, 763 F.2d 604, 610 n.10 (4th Cir. 1985) (*Klor's* does not apply to termination of a distributor resulting from a conspiracy between a competing distributor and a manufacturer); *Construction Aggregate Transp., Inc.* v. *Florida Rock Indus., Inc.*, 710 F.2d 752, 775 n.42 (11th Cir. 1983) (boycott requires "mutual agreement between entities on the same market level"); *Products Liab. Ins. Agency, Inc.* v. *Crum & Forster Ins. Cos.*, 682 F.2d 660, 664-65 (7th Cir. 1982) (*Klor's* does not apply to agreement between supplier and distributor that supplier will not deal with another distributor); *Gough* v. *Rossmoor Corp.*, 585 F.2d 381, 387 (9th Cir. 1978) (no boycott where concert of action "was in no way an agreement between competitors"); *E.A. McQuade Tours, Inc.* v. *Consolidated Air Tour Manual Comm.*, 467 F.2d 178, 186 (5th Cir. 1972) (no boycott where no allegation that defendants conspired with competitors of plaintiff), *cert. denied*, 409 U.S. 1109 (1973); *Ark Dental Supply Co.* v. *Cavitron Corp.*, 461 F.2d 1093, 1094 (3d Cir. 1972) (*Klor's* does not apply to defendant's decision to sell only to its dealers).

as *per se* illegal under the group boycott rule of *Klor's* and *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966). This Court rejected this argument, holding that the *per se* rule of *Klor's* and *General Motors* did not apply to the vertical relationship involved in *Business Electronics*, because "both [*Klor's* and *General Motors*] involved horizontal combinations . . . ." 485 U.S. at 734. This Court further explained:

> "Contrary to the dissent, *post*, at 742-743, 747, *General Motors* does not differ from the present case merely in that it involved a three-party rather than a two-party agreement. The agreement was among competitors in *General Motors*; it was between noncompetitors here. Cf. [Robert H.] Bork[, *The Antitrust Paradox*] 330 [(1978)] (defining 'boycotts' as 'agreements among competitors to refuse to deal')." 485 U.S. at 734 n.5.

The decision of this Court in *Business Electronics Corp.* v. *Sharp Electronics Corp.* is also directly at odds with the suggestion of the court below that a vertical agreement may be characterized as a horizontal restraint of trade if it seeks to disadvantage a competitor of one of the parties to the agreement (*see* 11a). In the *Business Electronics* case, this Court made clear that the test of a horizontal agreement is whether or not the agreement is between competitors, not whether or not the effects of the agreement are horizontal. 485 U.S. at 730-31 & n.4. Under this test, the agreement alleged in this case is undeniably vertical, not horizontal. Thus the decision below conflicts with the decision of this Court in *Business Electronics Corp.* v. *Sharp Electronics Corp.*, as well as with this Court's admonition that "the category of restraints classed as group boycotts is not to be expanded indiscriminately . . . ." *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 458 (1986).

The Court of Appeals' extension of the group boycott rule of *Klor's* to vertical nonprice agreements is wrong in principle because, in the words of Professor Areeda, "the core reason for intense antitrust concern about 'boycotts' is the aggregation of the power of several competitors — a reason that does not apply to distribution restraints involving a single manufacturer's product." 8 Phillip E. Areeda, *Antitrust Law* ¶1644c, at 474 (1989). This extension of the group boycott rule also threatens serious injury to competition by providing an antitrust theory which disappointed would-be suppliers can use to challenge buyers' decisions to deal with other suppliers. Such a result would harm the very competition which it is the purpose of the antitrust laws to protect (*see* pp. 7-8 *supra*).

The Court of Appeals seemed uneasily aware that its new two-firm supplier-purchaser group boycott rule threatens to swallow up the rule that purchasers may choose their suppliers. In an apparent attempt to avert this result, the Court of Appeals acknowledged that exclusive distributorship agreements "are generally considered permissible under the rule of reason," and stated that "*in general*, two-firm vertical combinations will be scrutinized as exclusive distributorship controversies, rather than as group boycotts" (12a; emphasis in original). But the Court of Appeals did not explain how the courts are to distinguish lawful exclusive distributorship agreements from two-firm supplier-purchaser group boycotts, except to say that in the present case no "pro-competitive rationale appears on the face of the complaint" (*id.*).

This is an entirely unsatisfactory and unpredictable rule of law, for it makes the general rule that purchasers may choose their suppliers subject to defeasance whenever plaintiffs' counsel are able to draft complaints that omit to mention any "pro-competitive rationale." The unsatisfactory nature of the Court of Appeals' new rule of law is further shown by the

fact that, in applying the new rule to this case, the Court of Appeals overlooked the fact that Discon's own pleading alluded to several procompetitive reasons for not dealing with Discon.[5]

Thus this Court should grant certiorari to review the holding of the Court of Appeals insofar as it creates a new rule of two-firm supplier-purchaser group boycott, because this rule is directly at odds with the decision of this Court in *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717 (1988), and with the rulings of at least nine circuits.

II. The Court of Appeals Also Created a Conflict Among Circuits, and a Conflict With the Decisions of This Court, by Characterizing a Two-Firm Supplier-Purchaser Relationship as a Conspiracy to Monopolize.

In addition to its claim under Section 1 of the Sherman Act, Discon asserted every imaginable claim under Section 2 of the Sherman Act: monopolization, attempt to monopolize, and conspiracy to monopolize (JA148-JA150).

The Court of Appeals held that Discon's claims of monopolization and attempt to monopolize were properly dismissed because the NYNEX companies neither competed nor sought

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5. These included the following: (1) MECo stopped using Discon after an investigation revealed that Discon had made a loan (which it did not expect to be repaid) to Robert W. Zirkelbach, an employee of MECo who dealt with Discon (*see* JA127-JA128); (2) NYT stopped using Discon after it learned that Discon had hired Zirkelbach to work for it (JA128); and (3) questions were raised about the honesty, quality and safety of Discon's work (*see* JA126-JA127). Naturally, Discon's pleading did not admit that these reasons were valid; but these reasons were more than enough to indicate that the Court of Appeals was wrong in positing that this was a case in which no procompetitive reasons appeared on the face of Discon's pleading.

to compete in the market for removal services (13a-14a). Logically, this fact likewise called for dismissal of Discon's conspiracy to monopolize claim, which asserted that the NYNEX companies had a specific intent to monopolize the market for removal services (JA150).

Instead of dismissing Discon's conspiracy to monopolize claim, the Court of Appeals upheld it on a theory not pleaded by Discon. The Court of Appeals stated that "[a] defendant may be liable for conspiracy to monopolize where it agrees with another firm to assist that firm in its attempt to monopolize the relevant market" (14a). The Court of Appeals assumed (without citing any relevant authority) that this theory of conspiracy to monopolize is applicable where a purchaser agrees to buy from one supplier (the alleged would-be monopolist) rather than another, and where the purchaser's role in the alleged conspiracy to monopolize consists solely of favoring the alleged would-be monopolist as a supplier of the purchaser's needs.[6]

Here again, the Court of Appeals placed itself in conflict with other circuits. It is well established that a buyer's agreement to use one supplier rather than another does not constitute a conspiracy in restraint of trade in violation of Section 1 of the Sherman Act (*see* pp. 7-8 *supra*). The same principle is applicable to a conspiracy to monopolize under Section 2 of the Sherman Act,[7] and the courts have likewise held that

6. All of the overt acts alleged by Discon to be part of the alleged conspiracy to monopolize (*see* JA150) consisted of actions by the NYNEX companies that allegedly favored AT&T Technologies and discriminated against Discon as a supplier to the NYNEX companies (*see* JA121-JA129).

7. Eminent antitrust authorities have observed that a conspiracy to monopolize under Section 2 of the Sherman Act must necessarily also be a conspiracy in restraint of trade under Section 1 of the Sherman Act, so that conduct not constituting a restraint of trade cannot constitute a conspiracy to monopolize. *See* 3 Phillip E. Areeda & Donald F. Turner, *Antitrust Law* ¶ 839, at 358 (1978); Richard A. Posner, *Antitrust Law: An Economic Perspective* 216 (1976).

such an agreement does not constitute monopolization or a conspiracy to monopolize in violation of Section 2 of the Sherman Act.[8]

Even in the extreme case where the purchaser is the only customer in the relevant market, it is not a conspiracy to monopolize for the purchaser to switch its business from one supplier to another, even if the result is that the disfavored supplier goes out of business. As the Seventh Circuit said in a case in which such allegations were made,

> "Regardless of what travel agency C & J uses, that agency will have a large percentage of the business in the relevant market. This economic fact should not and cannot prevent C & J from switching travel agencies. *See Dunn & Mavis, Inc.* v. *Nu-Car Driveaway, Inc.*, 691 F.2d 241 (6th Cir. 1982) (loss of Chrysler's business would allegedly destroy plaintiff's business)." *Great Escape, Inc.* v. *Union City Body Co.*, 791 F.2d 532, 540 (7th Cir. 1986).

If the law were otherwise — if a purchaser could not switch its business from one supplier to another without risking a claim of conspiracy to monopolize — the result would be the stifling of the very competition that the antitrust laws are

8. *See, e.g., Seagood Trading Corp.* v. *Jerrico, Inc.*, 924 F.2d 1555, 1576 (11th Cir. 1991); *Dreiling* v. *Peugeot Motors of America, Inc.*, 850 F.2d 1373, 1382 (10th Cir. 1988); *White* v. *Rockingham Radiologists, Ltd.*, 820 F.2d 98, 104-05 (4th Cir. 1987); *Great Escape, Inc.* v. *Union City Body Co.*, 791 F.2d 532, 540-41 (7th Cir. 1986); *Walker* v. *U-Haul Co. of Miss.*, 747 F.2d 1011, 1015-16 (5th Cir. 1984); *Dunn & Mavis, Inc.* v. *Nu-Car Driveaway, Inc.*, 691 F.2d 241, 244-45 (6th Cir. 1982).

meant to advance. As this Court stated in *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 767 (1984),

> "an efficient firm may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that the Sherman Act aims to foster."

As this Court went on to point out in a footnote at this point, 467 U.S. at 767-68 n.14, this is true even where the result is the acquisition of monopoly power:

> "For example, the Court has declared that § 2 does not forbid market power to be acquired 'as a consequence of a superior product, [or] business acumen.' *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966)."[9]

Thus the theory of the Court of Appeals that a buyer's choice of one supplier rather than another may be condemned as a conspiracy to monopolize is unsupportable.[10] Like the

9. Discon's allegation that NYT unjustifiably paid higher prices to AT&T Technologies does not change this result. To the extent that a regulated utility such as NYT unjustifiably pays higher prices, the resulting costs can be dealt with by regulatory authorities. *E.g.*, *Ehredt Underground, Inc.* v. *Commonwealth Edison Co.*, 90 F.3d 238, 240 (7th Cir. 1996). Indeed, as the court below admitted, such regulatory scrutiny took place in this case (5a).

10. In an apparent attempt to support this theory, the court below said that Discon's complaint could be read to assert that "MECo sought the dominance of AT&T Technologies in order to ensure the suppression of other suppliers who would bypass MECo and deal with NYTel directly" (15a). But, as the court recognized elsewhere in its opinion, MECo was in effect a purchasing agent for the NYNEX companies (9a-10a). Viewed against this background, there was nothing sinister or competitively significant about MECo's desire to deal with suppliers that would deal with MECo as a purchasing agent. It is commonplace for firms to require would-be suppliers to deal with them through a purchasing department or purchasing agent.

lower court's two-firm supplier-purchaser group boycott holding, its conspiracy to monopolize holding creates a conflict among circuits and with the decisions of this Court, and opens the door to a wave of treble damage actions by would-be suppliers seeking to challenge a defendant's decision to use another supplier. Certiorari should be granted to review and reverse this holding.

CONCLUSION

For the reasons set forth above, the Court should grant a writ of certiorari, and should summarily reverse the judgment of the United States Court of Appeals for the Second Circuit on the ground that it is contrary to *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717 (1988). In the alternative, the Court should grant a writ of certiorari and set the case down for briefing and argument.

Dated: April 3, 1997

Respectfully submitted,

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APPENDICES

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1126—August Term 1995
Argued: March 27, 1996 Decided: August 26, 1996
Docket No. 95-7673

DISCON, INCORPORATED,

Plaintiff-Appellant,

— v. —

NYNEX CORPORATION, NYNEX MATERIAL ENTERPRISES, NEW YORK TELEPHONE COMPANY, ROBERT J. ECKENRODE, and BERNARD O'REILLY,

Defendants-Appellees.

Before:

NEWMAN, *Chief Judge*,
OAKES and PARKER, *Circuit Judges*.

Appeal from the June 14, 1995, judgment of the United States District Court for the Western District of New York (Richard J. Arcara, Judge) dismissing plaintiff-appellant's antitrust and RICO complaint for failure to state a claim upon which relief can be granted.

Affirmed in part, reversed in part, and remanded for further proceedings.

SAMUEL A. CHERNIAK, New York, N.Y. (Phyllis Gelman, Gelman & Feinberg, New York, N.Y.; Goldstein, Navagh, Bulan & Chiari, Buffalo, N.Y., on the brief), *for plaintiff-appellant.*

GUY M. STRUVE, New York, N.Y. (James D. Liss, Vincent T. Chang, Seth R. Lesser, Davis Polk & Wardwell; Edward S. Bloomberg, Kevin J. English, Phillips, Lytle, Hitchcock, Blaine & Huber, Buffalo, N.Y., on the brief), *for defendants-appellees.*

JON O. NEWMAN, *Chief Judge:*

This appeal involves an antitrust suit brought by a former supplier alleging that its purchaser and a competitor acted in violation of the Sherman Act and the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Plaintiff-appellant Discon, Inc. ("Discon") appeals from the June 14, 1995, judgment of the United States District Court for the Western District of New York (Richard J. Arcara, Judge). The District Court dismissed Discon's amended complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. Discon argues that the District Court erred in holding that its complaint fails to allege a violation of either Section One or Section Two of the Sherman Act, 15 U.S.C. §§ 1, 2 (1994), or RICO, 18 U.S.C. § 1962 (1994). Because we believe that the District Court

prematurely dismissed two of Discon's claims, we affirm in part, reverse in part, and remand.

Background

Discon is a New York corporation whose primary business is the provision of "removal services" to telephone companies. These removal services include salvaging and disposing of obsolete telephone central office equipment. Discon was first formed in June 1984 to meet a demand created by the court-ordered break-up of the American Telephone and Telegraph Company ("AT&T"), *see generally United States* v. *American Telephone and Telegraph Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983). Prior to 1984, AT&T was able to monopolize the market for telecommunications equipment, including the market for removal services, through its ownership of the regional Bell Operating Companies ("BOCs"). AT&T would compel the BOCs to purchase supplies only from AT&T and its manufacturing affiliates, the Western Electric Co. and Bell Telephone Laboratories. In this manner, AT&T was able to extend the regulated monopoly power of its BOCs into other non-regulated markets. *Id.* at 222-23. Pursuant to the Consent Decree of 1984, AT&T divested itself of control over the BOCs. Thereafter, each BOC was instructed to purchase its products and services from a competitive field of suppliers. *Id.* at 227. Discon became one of those suppliers of removal services in the New York State area.

NYNEX Corp. ("NYNEX") is a successor entity that emerged out of the 1984 divestiture and replaced the BOCs that operated in New York and New England. NYNEX itself is a holding company that controls several wholly-owned subsidiaries, including NYNEX Material Enterprises ("MECo")

and two local telephone service providers, New York Telephone Co. ("NYTel") and New England Telephone and Telegraph Co. ("NET").[1] Within the NYNEX structure, MECo is a Delaware corporation whose primary business is the procurement of goods and services for NYNEX and its affiliated corporations, including NYTel. In effect, MECo serves as a purchasing agent for NYNEX and its other subsidiaries. NYTel is a New York corporation that provides local telephone service to most of New York State and some portions of Connecticut. NYTel is the dominant purchaser of removal services in the New York State area. As a regulated monopoly under the New York Public Service Laws, NYTel is subject to the state rate-making process. NYNEX and MECo, however, are not subject to state regulation.

AT&T Technologies is a wholly-owned subsidiary of AT&T, and is the successor entity to the Western Electric Co.[2] AT&T Technologies provides numerous network services, including removal services, to telephone companies throughout the United States. Within the New York State area, AT&T Technologies competes directly with Discon in the market for removal services.

Discon's complaint alleges that NYNEX, MECo, and NYTel (collectively, the "NYNEX Defendants") conspired with AT&T Technologies to eliminate Discon from the market for removal services. The crux of this conspiracy was a scheme to defraud the rate-paying public. During the mid-

1. NET is not named as a defendant in this lawsuit, nor is it otherwise involved in these proceedings.

2. Although AT&T Technologies is alleged by Discon to be a co-conspirator with NYNEX, MECo, and NYTel, it is not named as a defendant in this lawsuit.

1980s, MECo, as a non-regulated affiliate of NYNEX, would purchase removal services at inflated prices from AT&T Technologies. These removal services, along with their inflated prices, were then passed on to NYTel, a regulated affiliate of NYNEX. In turn, NYTel was able to overcharge its captive rate-paying customers pursuant to the rate-making process. MECo would then recoup its inflated costs by receiving a secret year-end "rebate" from AT&T Technologies. Thus, without being subject to any oversight from the state regulatory commission, MECo and its parent company, NYNEX, were able to generate increased revenues that were essentially derived from NYTel's telephone monopoly. This scheme was replicated in numerous contexts by the NYNEX Defendants for other capital goods and services purchased by NYTel. *See In re New York Telephone Co.*, 5 F.C.C.R. 866 (1990) ("*FCC Order*").

In an independent regulatory proceeding, the Federal Communications Commission ("FCC") found that this method of generating revenues — using MECo as an "outside" profit center — violated the Communications Act of 1934, 47 U.S.C. § 201(b) (1988). The FCC ordered NYTel to issue a rebate to its rate-paying customers for overcharges that occurred between 1984 and 1988. *FCC Report*, 5 F.C.C.R. 866. The FCC and NYTel subsequently entered into a consent decree. *See In re New York Telephone Co.*, 5 F.C.C.R. 5892 (1990) ("*FCC Consent Decree*"). Without admitting any wrongdoing or violations, NYTel agreed to refund over $35 million for "unreasonable rates reflecting improper capital costs and expense charges." *Id.*

Discon alleges that, as part of this conspiracy to defraud the rate-paying public, NYNEX and MECo, in purchasing removal services for NYTel, discriminated against Discon in

favor of AT&T Technologies because Discon refused to inflate its prices. Also, Discon would sometimes contract directly with NYTel, thus bypassing MECo altogether and undermining the basic premise of the outside profit-center scheme. Discon claims that, in retaliation for its non-cooperation, MECo and AT&T Technologies conspired to disseminate false information about Discon, to burden Discon with undue obligations under threat of economic duress, and to give preferential treatment to AT&T Technologies.

Discon filed its original complaint in the Western District of New York in May 1990, alleging that the NYNEX Defendants had violated Section One and Section Two of the Sherman Act and RICO. In June 1992, the District Court granted an initial motion to dismiss with leave to replead. Shortly thereafter, Discon filed an amended complaint, and the NYNEX Defendants moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). On June 14, 1995, the District Court dismissed with prejudice.

Discussion

I. Section One of the Sherman Act

This appeal typifies one of the primary difficulties in the judicial application of antitrust law. Under Section One of the Sherman Act, courts are asked to categorize various complex commercial arrangements into a rigid legal taxonomy, *e.g.*, horizontal restraint, vertical restraint, price-fixing, market division, concerted refusal to deal, and so on. This initial categorization is often outcome-determinative. Under one category, the arrangement may be *per se* illegal, while under another, it may be found permissible under the rule of reason. Due to the complexity of modern business transactions, however, courts often find that commercial

arrangements can be classified theoretically under a number of different categories. *See Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 8 (1979) (''[E]asy labels do not always supply ready answers.'') In this case, we believe that the District Court may have been misled by a poorly drafted complaint into categorizing the arrangement as one that is presumptively legal. Since the complaint may properly be understood to allege arrangements that might be shown to be unlawful, we are obliged to reverse in part and remand. We believe that the complaint states a cause of action under Section One of the Sherman Act, though under a different legal theory than the one articulated by Discon.

To state a claim under Section One of the Sherman Act, Discon must allege (1) that the NYNEX Defendants entered into a contract, combination, or conspiracy, and (2) that their agreement was in restraint of trade. *See* 15 U.S.C. § 1.[3] Traditionally, restraints of trade are classified as either horizontal restraints or vertical restraints. *See Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717, 730 (1984) (''*Sharp*''). Horizontal restraints are generally considered illegal *per se* if they fall within certain broad categories. *See United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 608

3. The NYNEX Defendants devote a single footnote in their brief to the argument that Discon failed to allege a ''conspiracy'' in restraint of trade. *See Monsanto Co.* v. *Spray-Rite Co.*, 465 U.S. 752, 765-67 (1984) (requirement of ''concerted action''). Although Discon's complaint is not a model of clarity, it alleges that NYNEX, MECo, and AT&T Technologies conspired to defraud the rate-paying public and that this agreement apparently contemplated some form of discrimination against Discon. More specifically, the complaint alleges the existence of various meetings between NYNEX procurement personnel, MECo officers, and agents of AT&T Technologies. These allegations are sufficient to defeat a motion to dismiss.

(1972) (market division); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211-12 (1959) (concerted refusal to deal); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) (horizontal price-fixing). Vertical restraints are illegal *per se* only where the agreement contains a further arrangement to fix prices, *i.e.*, vertical price-fixing. *See Sharp*, 485 U.S. at 724. Other types of horizontal restraints and vertical non-price restraints are assessed under the rule of reason. *Id.* at 726.

Discon alleges primarily that the NYNEX Defendants engaged in an unlawful horizontal restraint of trade. The complaint asserts that Discon, MECo, and AT&T Technologies were all providers of removal services to NYTel, and that MECo and AT&T Technologies entered into a conspiracy to discriminate against Discon. The complaint thus alleges a classic horizontal restraint of trade — an agreement between two potential rivals seeking to disadvantage a third competitor. *See* E. Thomas Sullivan & Jeffrey L. Harrison, *Understanding Antitrust and Its Economic Implications* § 4.13, at 110 (2d ed. 1994) (hereinafter "Sullivan, *Understanding Antitrust*"). In support of this theory, Discon alleges that MECo is a "supplier" of removal services, along with Discon and AT&T Technologies. The District Court, however, found this to be a mischaracterization. We agree. It is undisputed that MECo itself does not perform any removal services for NYTel. Rather, as the complaint acknowledges, "MECo's primary business function is *procuring* goods and services for New York Telephone [NYTel] . . . and for NYNEX Service Company." Thus, MECo acts essentially as a purchasing agent for NYNEX and NYTel, and in fact, it often served as an intermediary between NYTel and its actual suppliers, Discon and AT&T Technologies. *See Westchester*

Radiological Associates v. *Empire Blue Cross and Blue Shield, Inc.*, 707 F. Supp. 708, 712-13 (S.D.N.Y.) ("antitrust remedy" does not apply "where a buyer insists on buying his services through an intermediary"), *aff'd on opinion below*, 884 F.2d 707, 708 (2d Cir. 1989), *cert. denied*, 493 U.S. 1095 (1990).

It is true that, at times, NYTel would contract directly with Discon or other suppliers, and in those situations, presumably MECo would lose the opportunity to derive a commission. Therefore, in one sense, MECo could be considered, if not a supplier, at least a competitor with Discon and AT&T Technologies. Nonetheless, we decline to adopt this line of analysis for two reasons. First, MECo by its very nature transacts business for only one purchaser, NYTel. Unlike other intermediaries, such as wholesalers, who may transfer goods and services to a number of different purchasers, MECo does not resell removal services to any other telephone company.[4] Thus, MECo does not compete in the overall market for removal services, but only in the "market" for a single buyer. Second, the fact that MECo and NYTel are both affiliated under the same corporate structure strengthens the analogy of MECo to that of an internal purchasing agent. If MECo were organized as a purchasing department within NYTel, rather than as a separate corporate entity, it would be undisputed that MECo did not compete with Discon or AT&T Technologies. We believe it would be incongruous to apply a different rule of law simply because MECo holds its own corporate charter. *Cf. Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977) (courts in antitrust cases

4. Discon's complaint reveals at least one other telephone company, AT&T Communications, that purchases removal services in the New York State area.

should eschew "formalistic line drawing"). The fact remains that MECo acts at the behest of NYNEX and NYTel, and its actions are guided by a single corporate consciousness. *Cf. Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 771 (1984) (parent corporation and wholly-owned subsidiary are "single enterprise" for purpose of conspiracy requirement under Section One). A firm does not become a competitor of one of its suppliers solely by virtue of reselling goods or services to an affiliate under common ownership.

Since MECo is not a supplier of removal services and does not otherwise compete with Discon and AT&T Technologies in the overall market, Discon cannot succeed on its theory of a classic horizontal restraint of trade.[5] Nonetheless, we believe that Discon may be able to prevail under a different legal theory. In *Oreck Corp.* v. *Whirlpool Corp.*, 579 F.2d 126 (2d Cir.) *(in banc), cert. denied*, 439 U.S. 946 (1978), we noted that an agreement between two firms (*e.g.*, MECo and

5. Discon also argues that the agreement between MECo and AT&T Technologies could be characterized as a vertical agreement to fix prices. *See Sharp*, 485 U.S. at 724-26; *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911). We believe, however, that Discon has not stated a cause of action under a theory of vertical price-fixing. Discon admits that its allegations merely raise the "inference" that AT&T Technologies and MECo "intended" to influence the prices that MECo charged to NYTel. Yet this inference arises whenever a supplier sells its products to a purchasing agent. The price agreed upon between the supplier and the purchasing agent will by definition exert some influence upon the final price that the purchasing agent passes on to its client. Discon does not allege that MECo was in any way restricted in its freedom to set whatever prices it charged to NYTel. Therefore, the arrangement between MECo and AT&T Technologies cannot be characterized as one to "fix" prices. *See Sharp*, 485 U.S. at 731 (vertical price-fixing conspiracy must contain "some agreement on price or price levels").

AT&T Technologies), even in a vertical relationship, may be characterized as a horizontal restraint of trade if the agreement seeks to disadvantage the direct competitor (*e.g.*, Discon) of one of the conspiring firms. *Id.* at 131-32 & n.6; *see* Sullivan, *Understanding Antitrust, supra*, § 4.13, at 110 (describing different types of concerted refusals to deal); L. Sullivan, *Handbook of the Law of Antitrust* 230-31 & n.1 (1977) (same). *Oreck* sought to elaborate on the Supreme Court's decision in *Klor's*, 359 U.S. at 211-12, where the Court held that a retailer may not induce its manufacturers to refrain from selling to a competing retailer. In *Klor's*, the agreements between the defendant-retailer and its manufacturers were essentially vertical in nature. Yet the Supreme Court applied a "group boycott" theory because it found that the intent and effect of these vertical agreements was a horizontal market impact. *Id.*

It is true that *Klor's* is not directly on point, because in that case numerous manufacturers participated in a group boycott, whereas here the complaint alleges only a single boycotting firm, MECo, and a single competitor, AT&T Technologies. Nonetheless, *Klor's* has been extended in the Sixth and Ninth Circuits to the situation where only a single retailer and a single manufacturer conspire. *See Com-Tel, Inc.* v. *DuKane Corp.*, 669 F.2d 404, 411-13 & nn. 13, 16 (6th Cir. 1982); *Cascade Cabinet Co.* v. *Western Cabinet & Millwork Inc.*, 710 F.2d 1366, 1370-71 (9th Cir. 1983); *see also Cernuto, Inc.* v. *United Cabinet Corp.*, 595 F.2d 164, 168 (3d Cir. 1979). The Eleventh Circuit, on the other hand, has expressly declined to extend *Klor's* in such a manner. *See Construction Aggregate Transport, Inc.* v. *Florida Rock Industries, Inc.*, 710 F.2d 752, 776-78 (11th Cir. 1983); *see also Westman Commission Co.* v. *Hobart International, Inc.*, 796 F.2d 1216,

1224 n.1 (10th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988).

We can understand why some courts are reluctant to extend *Klor's* to two-firm group boycotts, since such arrangements will often resemble exclusive distributorship agreements, which are generally considered permissible under the rule of reason. *See Oreck*, 579 F.2d at 131. We emphasize that our decision should not be read to conflict with the holding in *Oreck* that, *in general*, two-firm vertical combinations will be scrutinized as exclusive distributorship controversies, rather than as group boycotts. *Id.; see also Sharp*, 485 U.S. at 725-31 & n.4 (two-firm group boycott should be judged under rule of reason); *K.M.B. Warehouse Distributors, Inc.* v. *Walker Manufacturing Co.*, 61 F.3d 123, 127 (2d Cir. 1995) (decision to use one distributor over another does not violate Section One). Yet *Oreck* cautioned that it may not always be true that two-firm group boycotts are permissible; rather, "a careful scrutiny into the business justifications for the agreement is required." *Id.* at 132 n.6.

In the vast majority of cases, the decision to discriminate in favor of one supplier over another will have a pro-competitive intent and effect. *Cf. Sharp*, 485 U.S. at 724-25. Presumably, the purchaser will have chosen a particular supplier because that firm provides certain efficiencies that allow the purchaser to compete more effectively in the market for sales to the ultimate consumer. In this case, however, no such pro-competitive rationale appears on the face of the complaint. Discon alleges that the intent and effect of choosing AT&T Technologies over Discon was entirely anti-competitive. Although the NYNEX Defendants may be able to present some pro-competitive justification for choosing a more costly supplier in order to overcharge captive rate-paying customers, this justification, if it exists, remains unproven. We conclude

that Discon has alleged a cause of action under, at least, the rule of reason, and possibly under the *per se* rule applied to group boycotts in *Klor's*, if the restraint of trade "'has no purpose except stifling competition.'" *Oreck*, 579 F.2d at 131 (quoting *White Motor Co.* v. *United States*, 372 U.S. 253, 263 (1963)).[6]

II. Section Two of the Sherman Act

Discon also alleges that the NYNEX Defendants violated Section Two of the Sherman Act by engaging in monopolization, attempted monopolization, and conspiracy to monopolize. *See* 15 U.S.C. § 2. We consider each of these claims separately.

A. Monopolization

To state a claim for monopolization, Discon must allege, among other things, that the defendants possess monopoly power in a relevant market. *See United States* v. *Grinnell*, 384 U.S. 563, 570 (1966). In this case, however, none of the NYNEX Defendants competes in the relevant market for removal services. NYNEX and NYTel are purchasers, not suppliers, of removal services, and MECo, as we have noted, is only a purchasing agent for NYTel and cannot be considered a competitor in the overall market.[7] Thus, Discon's

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6. We do not decide at this point whether the District Court on remand should apply a *per se* rule; however, we note that the traditional rationale for applying the rule of reason to two-firm group boycotts — the promotion of interbrand competition over intrabrand competition — does not exist in this case. *Cf. Sharp*, 485 U.S. at 724-25; *Oreck*, 579 F.2d at 131.

7. The only conspiring firm that competes in the market for removal services is AT&T Technologies; however, it is not named as a defendant in this lawsuit.

claim of monopolization must fail, since it is axiomatic that a firm cannot monopolize a market in which it does not compete. *See Official Airlines Guides, Inc.* v. *FTC*, 630 F.2d 920, 925-27 (2d Cir. 1980), *cert. denied*, 450 U.S. 917 (1981); *FLM Collision Parts, Inc.* v. *Ford Motor Co.*, 543 F.2d 1019, 1030 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977).

B. Attempted Monopolization

Discon's claim of attempted monopolization fails for the same reason. To state a cause of action for attempted monopolization, Discon must allege, among other things, that there is a "dangerous probability" that the attempt will succeed. *See International Distribution Centers, Inc.* v. *Walsh Trucking Co.*, 812 F.2d 786, 790 (2d Cir.), *cert. denied*, 482 U.S. 915 (1987). In this case, there was no "dangerous probability" that the NYNEX Defendants would succeed in monopolizing the market for removal services, since they do not even compete in that market and there is no indication that they ever sought to do so. *See FLM Collision Parts*, 543 F.2d at 1030.

C. Conspiracy to Monopolize

To state a claim for conspiracy to monopolize, Discon must allege that there was (1) concerted action, (2) overt acts in furtherance of the conspiracy, and (3) specific intent to monopolize. *See International Distribution Centers*, 812 F.2d at 795. Unlike the previous two Section Two claims, to be liable for conspiracy to monopolize, it is not necessary that the NYNEX Defendants compete directly in the market for removal services. A defendant may be liable for conspiracy to monopolize where it agrees with another firm to assist that firm in its attempt to monopolize the relevant market. We

conclude that the complaint sufficiently alleges that the NYNEX Defendants conspired with AT&T Technologies and performed overt acts intending to assist AT&T Technologies in its monopolization of the market for removal services. The requirement of pleading specific intent is met insofar as Discon alleges that MECo sought the dominance of AT&T Technologies in order to ensure the suppression of other suppliers who would bypass MECo and deal with NYTel directly. Therefore, since Discon has alleged the essential elements of a conspiracy to monopolize, the District Court should not have dismissed this claim.

III. Civil RICO

Finally, Discon alleges several violations of RICO, 18 U.S.C. § 1962. Discon alleges that the NYNEX Defendants violated subsections 1962(b), (c), and (d). All three of these claims were properly dismissed by the District Court.

A. Subsection 1962(b)—RICO acquisition

Discon first alleges a violation of subsection 1962(b), which prohibits the "acquisition or maintenance" of an enterprise through a pattern of racketeering activity. Defining the relevant "enterprise" as NYTel, Discon claims that NYNEX and MECo controlled NYTel through a number of illegal predicate acts. It is undisputed, however, that NYNEX acquired legal control over NYTel during the 1984 divestiture. Discon does not allege any facts to support a finding that this control, which exists by virtue of stock ownership in a wholly-owned subsidiary, was "acquired" or "maintained" through a pattern of racketeering activity.

Moreover, Discon has not alleged the sort of "acquisition injury" necessary to state a claim under subsection 1962(b).

We have held, in the context of subsection 1962(a), prohibiting the "use or investment of income" derived from a pattern of racketeering activity, that "the essence of a violation of § 1962(a) is not commission of predicate acts but investment of racketeering income." *Ouaknine* v. *MacFarlane*, 897 F.2d 75, 82-83 (2d Cir. 1990). In the context of subsection 1962(a), therefore, we have required that the plaintiff allege a "use or investment injury" that is distinct from the injuries resulting from predicate acts.

Similarly, other circuits have held that, in order to state a cause of action under subsection 1962(b), "plaintiffs must allege an 'acquisition' injury, analogous to the 'use or investment injury' required under § 1962(a) to show injury by reason of a § 1962(b) violation." *Danielsen* v. *Burnside-Ott Aviation Training Center, Inc.*, 941 F.2d 1220, 1231 (D.C. Cir. 1991); *accord Compagnie de Reassurance d'Ile de France* v. *New England Reinsurance Corp.*, 57 F.3d 56, 92 (1st Cir.), *cert. denied*, 116 S. Ct. 564 (1995); *Lightning Lube, Inc.* v. *Witco Corp.*, 4 F.3d 1153, 1191 (3d Cir. 1993); *Old Time Enterprises, Inc.* v. *International Coffee Corp.*, 862 F.2d 1213, 1219 (5th Cir. 1989). In this case, Discon has not alleged any injury stemming from the "acquisition or maintenance" of NYTel by NYNEX and MECo, only injuries resulting from the commission of predicate acts. Without a distinct "acquisition injury," Discon cannot state a cause of action under subsection 1962(b).

B. Subsection 1962(c)—RICO conduct

Discon also alleges a violation of subsection 1962(c), which prohibits "any person employed by or associated with any enterprise . . . to conduct . . . such enterprise's affairs through a pattern of racketeering activity . . . ." 18 U.S.C.

§ 1962(c).[8] For this claim, Discon redefines the enterprise as the "NYNEX Group," which consists of the three corporations, NYNEX, MECo, and NYTel. Discon claims that these three corporate "persons" conducted the affairs of the NYNEX Group "enterprise" through a number of illegal predicate acts.

We have previously held, however, that subsection 1962(c) "clearly envisions" that the "person" and the "enterprise" will be distinct. *Bennett* v. *United States Trust Co.*, 770 F.2d 308, 315 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986). "[A] corporate entity may not be simultaneously the 'enterprise' and the 'person' who conducts the affairs of the enterprise through a pattern of racketeering activity." *Id.* In *Riverwoods Chappaqua Corp.* v. *Marine Midland Bank*, 30 F.3d 339 (2d Cir. 1994), we explained further that the distinctiveness requirement of *Bennett* may not be circumvented "by alleging a RICO enterprise that consists merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant . . . ." *Id.* at 344. "Where employees of a corporation associate together to commit a pattern of predicate acts in the course of their employment and on behalf of the corporation, the employees in association with the corporation do not form an enterprise distinct from the corporation." *Id.* Thus, in *Riverwoods*, we found that the activities of two loan officers "acting within the scope of their authority" could not subject them to RICO

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8. Unlike subsections 1962(a) and (b), under subsection 1962(c), a plaintiff need not allege a distinct "racketeering injury" in order to state cause of action. *See Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 494-95 (1985).

liability for conducting the affairs of the alleged enterprise-bank.

In response, Discon cites *Cullen* v. *Margiotta*, 811 F.2d 698 (2d Cir.), *cert. denied*, 483 U.S. 1021 (1987), for the proposition that a defendant may simultaneously be a RICO "person" and one of a number of members in the RICO "enterprise." *Id.* at 729-30. In *Cullen*, the enterprise was defined as an association of three separate entities — a municipality, the town Republican Committee, and the county Republican Committee. *Id.* at 728. We held that any of the three individual entities could be convicted under subsection 1962(c) for its participation in the tripartite enterprise.

The difference between *Riverwoods* and *Cullen* appears to lie in the fact that *Riverwoods* involved only a single corporate entity that was associated with its employees, whereas *Cullen* involved three legally separate entities that could be differentiated from the enterprise-group. Moreover, in *Riverwoods*, the individual defendants were acting on behalf of the enterprise-corporation, and therefore, it would have been especially inappropriate to hold that they were "distinct" from the enterprise.

In this case, we confront a situation that lies somewhere between *Riverwoods* and *Cullen*. Like the defendants in *Riverwoods*, NYNEX, MECo and NYTel operate within a unified corporate structure. At the same time, however, they are also legally separate entities from each other and from the NYNEX Group. Although our decision is by no means dictated by clear precedent, we believe that *Riverwoods* presents the more analogous situation. The relationship between NYNEX, MECo, and NYTel in comparison to the NYNEX

Group is not substantially different from that between the loan officers in *Riverwoods* in comparison to the bank. In both cases, the individual defendants were acting within the scope of a single corporate structure, guided by a single corporate consciousness. It would be inconsistent for a RICO person, acting within the scope of its authority, to be subject to liability simply because it is separately incorporated, whereas otherwise it would not be held liable under *Riverwoods*. *But see Haroco, Inc.* v. *American National Bank & Trust Co.*, 747 F.2d 384, 402 (7th Cir. 1984) (wholly-owned subsidiary is technically distinct from parent corporation and may be liable under RICO), *aff'd on other grounds*, 473 U.S. 606 (1985).

Discon's reference to unnamed "attorneys, accountants and other agents" as part of the enterprise does not alter this analysis. *Riverwoods* expressly applies to "agents" as well as "employees" so long as those persons act on behalf of the corporation. Although the situation might be different if the defendants were acting outside the scope of their agency, this situation is not presented here.

C. Section 1962(d)—RICO conspiracy

Lastly, Discon alleges a violation of subsection 1962(d), which prohibits any conspiracy to commit a RICO violation. Discon's complaint incorporates its prior two claims by reference and simply adds the further allegation that the NYNEX Defendants "consciously agreed to join and to enter a conspiracy" to commit these substantive acts. Since we have held that the prior claims do not state a cause of action for substantive violations of RICO, the present claim does not set forth a conspiracy to commit such violations. *See Lightning*

Lube, 4 F.3d at 1191 (''Any claim under § 1962(d) based on conspiracy to violate the other subsections of section 1962 necessarily must fail if the substantive claims are themselves deficient.''); *Danielsen*, 941 F.2d at 1232.

Conclusion

We affirm the judgment of the District Court insofar as it dismissed Discon's claims for vertical price-fixing under Section One of the Sherman Act, for monopolization and attempted monopolization under Section Two of Sherman Act, and for RICO acquisition, RICO conduct, and RICO conspiracy under RICO. We reverse the judgment of the District Court and remand for further proceedings with regard to Discon's claims of an unlawful two-firm group boycott under Section One of the Sherman Act, and a conspiracy to monopolize under Section Two of the Sherman Act.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DISCON, INCORPORATED,

Plaintiff,

v.

NYNEX CORPORATION,
NYNEX MATERIEL ENTERPRISES,
NEW YORK TELEPHONE,
ROBERT J. ECKENRODE,
BERNARD O'REILLY,

Defendants.

DECISION AND ORDER
90-CV-546A

INTRODUCTION

Defendants, NYNEX Corporation (''NYNEX''), NYNEX Materiel Enterprises (''MECo''), New York Telephone (''NYT''), Robert J. Eckenrode (''Eckenrode''), and Bernard O'Reilly (''O'Reilly''), have moved to dismiss Discon Incorporated's (''Discon'') Amended Complaint pursuant to Fed. R. Civ. P. 9(b) and 12(b)(6). They have also moved, pursuant to Fed. R. Civ. P. 11, for sanctions against Discon and its counsel for filing the Amended Complaint without conducting a reasonable inquiry into the law.

After reviewing the submissions of the parties and hearing argument from counsel, the Court grants defendants' motion to dismiss the Amended Complaint for failure to state a claim. Defendants' motion for sanctions is denied.

BACKGROUND

The Court granted defendants' motion to dismiss plaintiff's original Complaint ("Complaint") without prejudice in a Decision and Order filed on June 23, 1992 ("Decision"). The Court denied defendants' motion for sanctions, also without prejudice. Plaintiff was granted leave to amend the Complaint. Plaintiff filed an Amended Complaint and a RICO Case Statement on July 31, 1992. The Amended Complaint includes thirteen causes of action.

DISCUSSION

I. Motion to Dismiss

In deciding defendants' motion to dismiss the Amended Complaint for failure to state a claim upon which relief can be granted, the Court applies the same standards as those governing the adequacy of an original filed pleading. *Ricciuti* v. *N.Y.C. Transit Auth.*, 941 F.2d 119, 123 (2d Cir. 1991). The Court is required to accept the well-pleaded factual allegations of the Amended Complaint as true. *Branum* v. *Clark*, 927 F.2d 698, 705 (2d Cir. 1991) (citing *Cooper* v. *Pate*, 378 U.S. 546 (1964) (per curiam)); *Dwyer* v. *Regan*, 777 F.2d 825 (2d Cir. 1985), *modified on other grounds*, 793 F.2d 457 (2d Cir. 1986). The allegations of the Amended Complaint must be construed in Discon's favor. *Papasan* v. *Allain*, 478 U.S. 265, 283 (1986); *Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974). Indeed, the Court cannot grant the motion to dismiss unless "it is clear that no relief [can] be granted under any set of facts that [can] be proved consistent with the allegations." *H.J., Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 249-50 (1989) (quoting *Hishon* v. *King & Spalding*, 467 U.S. 69, 73 (1984)); *see also Conley*

v. *Gibson*, 355 U.S. 41, 45-46 (1957).

Applying these principles, the Court concludes that Discon's Amended Complaint must be dismissed.

A. Amended Complaint[1]

Plaintiff Discon is incorporated in New York State. It was formed in June of 1984 by Robert Faltisco. Its primary business is the provision of "removal services," which includes the salvage and disposal of obsolete telephone central office equipment. Amended Complaint ¶ 13.

Discon was formed to meet a demand created by the January 1, 1984 court-ordered break up of American Telephone and Telegraph Company and its affiliates Western Electric Company, Inc., and Bell Telephone Laboratories, Inc. (collectively "old AT&T") into competing enterprises. Among other things, the terms of the breakup of old AT&T require that all carriers of telephone calls between different exchanges have access to other exchanges that are equal in type, price and quality to the access provided to AT&T and its affiliates. *See United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 227 (D.D.C. 1982), *aff'd sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983).

From the time it was formed in June of 1984, through 1986, Discon supplied central office equipment removal services to NYT. NYT was Discon's principal customer, if not its only one.

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1. A full description of the background of this litigation is set out in the Court's Decision dismissing the Complaint, at pages 3-7. The Court repeats here only those portions which are helpful for understanding the instant proceeding.

Defendant NYT is a New York corporation that provides local telephone exchange service in most of New York State and some portions of Connecticut. NYT is a wholly owned subsidiary of NYNEX. Because NYT is in a business subject to New York State Public Service Law, its profits are regulated. NYNEX's profits are not. NYT is a dominant purchaser of removal services in the New York State area. Amended Complaint ¶¶ 14, 29.

Defendant MECo is incorporated under the laws of Delaware and is a subsidiary of NYNEX. Its primary business function is procuring goods and services for NYT and New England Telephone and Telegraph ("NET"). Amended Complaint ¶ 16.

American Telephone and Telegraph Company ("AT&T") is the parent company of AT&T Technologies ("Technologies").[2] Technologies is the former Western Electric Company, Inc. and is a supplier of network services, among its other operations. In the course of its network services business, Technologies supplies central office equipment removal services to NYT. Technologies is the dominant supplier of removal services in New York State. Amended Complaint ¶ 26. Discon alleges that NYNEX, through its affiliates NYT and MECo, and Technologies conspired to monopolize the market for removal services and took concerted action to drive Discon from the market for removal services. Amended Complaint ¶ 2.

Discon further alleges that MECo favored Technologies over Discon when purchasing central office equipment removals required by NYT and that MECo and Technologies

2. Neither AT&T or Technologies are defendants in this action.

maintained an artificially high price for removal services provided to NYT. MECo was allegedly motivated to favor Technologies over Discon, and to undermine Discon, so that it could markup the price of central office removals it charged its regulated affiliate, NYT. MECo's inflated prices for central office removals made for allegedly high profits, some of which MECo paid to NYNEX as dividends. Acting in concert, Technologies and MECo used markups and rebates to divide the monopoly profits derived from the sale of removal services to NYT. Amended Complaint ¶ 31.

Discon continued to work for NYT until June 1986, when it was suspended as a supplier eligible to offer central office removal services to NYT. Plaintiff alleges that it stopped working for NYT after it hired a former employee of MECo, Robert Zirkelbach. Zirkelbach resigned from MECo on July 9, 1985 after an internal investigation by NYT Security. Plaintiff alleges that NYT falsely told the Public Service Commission that Discon made Zirkelbach a loan that it did not expect Zirkelbach to repay. Amended Complaint ¶¶ 50-55.

The Amended Complaint refers to a number of alleged incidents in which defendants treated Discon unfairly. Plaintiff alleges that "MECo forced Discon to accept obligations outside its contract, to forego billing job changes and to dispose of scrap on non-economic terms." Amended Complaint ¶ 38. Further, MECo executives "upbraided" Discon for dealing directly with NYT and disclosing the price of a removal job. Amended Complaint ¶ 41. Plaintiff also alleges that O'Reilly instructed Discon "to 'salt' scrap . . . by placing higher grade switches on top," Amended Complaint ¶ 74, and "directed Faltisco . . . to remove wire spring relays from scrap sold to AMAX [Copper]." Amended Complaint ¶ 75.

It further alleges that MECo discriminated against Discon and in favor of Technologies by allowing Technologies to use a prepaid billing system, Amended Complaint ¶ 35, and by awarding Technologies written contracts and authorizations for three jobs whose value exceeded one million dollars. Amended Complaint ¶ 37.

Discon also alleges that NYNEX and MECo participated in a scheme to defraud ratepayers by causing NYT to record overcharges in its regulated accounts, which enabled NYT to charge rates for local telephone service and exchange access that exceeded the rates it could maintain in the absence of the scheme to defraud. Amended Complaint ¶ 64.

Discon has deleted certain claims contained in the Complaint from the Amended Complaint: (1) a violation of 18 U.S.C. § 1962(a), which prohibits the investment in an interstate enterprise of income derived from a pattern of racketeering activity or through the collection of unlawful debt; (2) a violation of the New York Consumer Protection Act, N.Y. Gen. Bus. Law § 349; (3) a violation of the New York Public Service Law § 93; and (4) its third party beneficiary claim.

In addition to deleting certain claims, the Amended Complaint contains new allegations not raised in the Complaint, including allegations: (1) that Discon was injured as a NYT ratepayer by the alleged anti-competitive and racketeering acts of defendants, Amended Complaint ¶¶ 13, 124, 125; (2) that NYNEX showed favoritism to Technologies by entering into contracts for the purchase of high technology equipment and plug-in circuit boards, Amended Complaint ¶¶ 29, 33(b), 59, 61, 63, 72; (3) regarding NYNEX's disclosures to the Federal Communications Commission and the Securities Exchange Commission, Amended Complaint ¶¶ 67, 82; and

(4) regarding NYNEX's federal tax returns, Amended Complaint ¶ 87.

Finally, Discon alleges that, as a result of defendants' actions, it was forced to discontinue its business operations. It claims to be a victim of the same kind of anti-competitive conduct that led to the breakup of the old AT&T in the early 1980's and seeks damages in excess of $75,000,000.

B. Restraint of Trade Claim[3]

Section 1 of the Sherman Act provides that: "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. The Sherman Act was enacted "for the protection of *competition*" in business and commercial transactions. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962) (emphasis in original)). To state a claim under Section 1 of the Sherman Act, Discon must allege that: (1) the NYNEX defendants entered into a "contract, combination . . . or conspiracy"; and (2) that the conspiracy was "in restraint of trade or [interstate] commerce." *See International Distribution Centers, Inc.* v. *Walsh Trucking Co.*, 812 F.2d 786, 793 (2d Cir.), *cert. denied*, 482 U.S. 915 (1987).

The Fourth Count of the Amended Complaint purports to allege that, in violation of Section 1 of the Sherman Act, MECo and Technologies entered into an arrangement to fix

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3. Discon has re-arranged its Sherman Act claims in the Amended Complaint and now pleads its Section 2 claims first. Because the Court seeks to eliminate any confusion that might result, it will address Discon's Section 1 Restraint of Trade claims first, as it did in its Decision dismissing the Complaint.

prices and to restrict competition in the markets for removal services at NYT and in the New York State area; and that MECo and Technologies attempted to fix prices and restrict competition for other products and services purchased with funds from NYT's regulated accounts, such as transmission and switching equipment. Amended Complaint ¶ 110. Discon further alleges that MECo and AT&T conspired to exclude Discon from the market for removal services and agreed that NYT would not obtain removal services from Discon, but would obtain removal services from Technologies. Amended Complaint ¶ 33.

The Court finds that Discon fails to allege that defendants entered into an illegal contract, combination or conspiracy; or an actionable restraint of trade. The core of plaintiff's allegations remains the same as in the Complaint: that NYNEX and AT&T agreed to exclude Discon from NYT's removal service business and to award scrap removal service contracts to Technologies instead. The Court has already held that this allegation fails to state a claim under § 1 of the Sherman Act because the facts alleged show only a "vertical" arrangement between a buyer of services, the NYNEX companies, and a seller of services, Technologies and not a "horizontal" division of a market between competitors. Decision, at 10.

In an effort to fix its Section 1 claim Discon now alleges that NYNEX and AT&T:

> created a horizontal combination whose object was to exclude new entrants from the monopolized market for removal services, to maintain high price levels in this market, and to recover these administered prices through regulated rates for telephone service.

Amended Complaint ¶ 29.

The fact that NYNEX, NYT and MECo were purchasers of Discon's services and not competitors of Discon is fatal to Discon's Section 1 claim. Discon attempts to avoid this analysis by purporting to allege that MECo and Technologies were the dominant suppliers of removal services in the New York State area.[4] Amended Complaint, ¶ 29. Plaintiff fails, however, to allege any facts to support this conclusory statement. Moreover, in contradictory fashion, the Amended Complaint admits that "MECo's primary business function is procuring goods and services for New York Telephone and New England Telephone, and for NYNEX Service Company . . ." Amended Complaint, ¶ 16 and that MECo served as the intermediary between NYT and Discon. *See* Amended Complaint, ¶¶ 3, 40, 44. Because the Court finds that MECo and Discon were not competitors in the scrap removal market, it finds that this is not a case of horizontal price fixing and dismisses Discon's Section 1 claim.

The Second Circuit has stressed that when a firm stops purchasing from one supplier and starts purchasing from another, "the fact that an agreement between the buyer and the new supplier is necessarily involved does not make it an illegal conspiracy" under the Sherman Act. *Nifty Foods Corp.* v. *Great Atl. & Pac. Tea Co.*, 614 F.2d 832, 841 (2d Cir. 1980) (citations omitted). The Supreme Court has held that the Sherman Act permits a company to announce that it will do business only with companies that acquiesce to certain nonprice conditions and to refuse to do business with those

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4. The Court notes that this allegation is inconsistent with the facts plead by Discon in the Complaint: that MECo procured scrap removal services for NYT. *See* Complaint, ¶¶ 13, 51, 54.

who fail to comply. *See, e.g., Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984); *United States* v. *Colgate & Co.*, 250 U.S. 300, 307 (1919). Section 1 of the Sherman Act will only be implicated when there is a conspiracy with other parties "in an effort to force [a seller] to comply with fixed prices." *Pants 'N' Stuff Shed House, Inc.* v. *Levi Strauss & Co.*, 619 F. Supp. 945, 947 (W.D.N.Y. 1985).

There is no factual allegation in the Amended Complaint of a conspiracy to force a seller to comply with fixed prices. *Pants 'N' Stuff Shed House, Inc.*, 619 F. Supp. at 947. Rather, Discon realleges what it claimed in the Complaint, that NYNEX announced in advance that it would only do business with companies that dealt with MECo rather than with NYT directly, and that it refused to do business with those who failed to comply with this condition. This Court already determined that this is a nonprice condition that does not violate Section 1 of the Sherman Act, so long as it was implemented independently. Decision, at 11; *Monsanto*, 465 U.S. at 761; *see also Westchester Radiological Assocs. P.C.* v. *Empire Blue Cross & Blue Shield, Inc.*, 707 F. Supp. 708, 713 (S.D.N.Y. 1989) (seller has no antitrust claim when a buyer with market power "insists upon buying his services through an intermediary"), *aff'd on opinion below*, 884 F.2d 707 (2d Cir. 1989), *cert. denied*, 493 U.S. 1095 (1990). Moreover, the Amended Complaint nowhere indicates what prices other than those paid by defendants for services they themselves purchased were supposedly "fixed." In the absence of any effect on prices besides those paid by defendants, there can be no claim of price fixing. *Toys "R" Us, Inc.* v. *R.H. Macy & Co.*, 728 F. Supp. 230, 233 (S.D.N.Y. 1990) (no price-fixing claim when all that was alleged was agreement with manufacturers to fix retailer's own prices).

A company "of course generally has the right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." *Monsanto*, 465 U.S. at 761. The Court directed Discon that in order to succeed on its Section 1 restraint of trade claim, it must be prepared to prove, through direct and circumstantial evidence, facts tending to exclude the possibility that NYNEX's conduct was unilaterally undertaken. Decision, at 11.

Plaintiff no longer alleges that NYNEX and MECo refused to do business with Discon because it inherently threatened to expose MECo's alleged excessive markups to NYT. Instead, in an effort to comply with the Court's directive, plaintiff has set forth a number of allegations attempting to exclude the possibility that NYNEX acted unilaterally in choosing Technologies rather than Discon for scrap removal services. Amended Complaint, ¶33. The Amended Complaint also alleges, however, that NYNEX did have an independent reason for choosing Technologies rather than Discon as a supplier. Plaintiff claims that, after mid-1985, MECo increased its profits by using high-cost vendors, such as Technologies, rather than Discon. Amended Complaint, ¶51. Thus, the Court finds that Discon has failed to plead specific facts that rule out the possibility that NYNEX acted unilaterally in choosing Technologies over Discon. The failure to specify what concerted actions NYNEX and AT&T took to further their alleged goal requires dismissal of plaintiff's Sherman Act §1 claim. *Telectronics Proprietary Ltd.* v. *Medtronic, Inc.*, 687 F. Supp. 832, 837 (S.D.N.Y. 1988); *see also Eastway Constr. Corp.* v. *New York*, 762 F.2d 243, 250 (2d Cir. 1985).

Finally, Discon attempts to allege a conspiracy between MECo and AT&T to restrain trade in the market for other

goods and services, such as transmission and switching services, Amended Complaint, ¶ 110, markets in which Discon does not compete. Discon alleges that it has standing to complain of antitrust violations outside of the scrap removal market because, as a telephone ratepayer, it paid higher rates as a result of this alleged conspiracy. Such a claim, however, is barred by the filed rate doctrine, which bars suits against regulated utilities grounded on the allegation that the rates charged by the utility are unreasonable. The doctrine holds that any filed rate, that is, one approved by the governing regulatory agency, is per se reasonable and, therefore, not challengeable in judicial proceedings brought by ratepayers. *Keogh* v. *Chicago & Northwestern Ry. Co.*, 260 U.S. 156 (1922); *see also, Square D Co.* v. *Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986); *Wegoland Ltd.* v. *NYNEX Corp.*, 27 F.3d 17 (2d Cir. 1994).

Accordingly, for the reasons stated, to the extent that Discon attempts to state a Sherman Act § 1 claim based on its standing as a ratepayer, its claim is dismissed.

C. Monopoly Claims

Section 2 of the Sherman Act provides that: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." 15 U.S.C. § 2.

The First and Second Counts of the Amended Complaint purport to allege that NYNEX, NYT and MECo attempted to monopolize and did monopolize the market for removal services at NYT and in the New York State area. Amended Complaint, ¶¶ 100-102, 104-105. The Third Count of the

Amended Complaint purports to allege that NYNEX, NYT and MECo conspired among themselves and with Technologies to monopolize the market for removal services at NYT and in the New York State area. Amended Complaint, ¶¶ 106-108. The Court addresses these theories *seriatim*.

1. Attempted Monopolization

The elements of attempted monopolization under Section 2 are: "(1) anticompetitive or exclusionary conduct; (2) specific intent to monopolize; and (3) a dangerous probability that the attempt will succeed." *Volvo N. Am. Corp.* v. *Men's Int'l Professional Tennis Council*, 857 F.2d 55, 73-74 (2d Cir.) (citations omitted), *cert. denied*, 487 U.S. 1219 (1988).

The Court dismissed Discon's attempted monopolization claim in the Complaint because Discon failed to allege specific intent to monopolize. Specific intent to monopolize is a necessary element of a claim based on attempt to monopolize, *id.*, and generalized allegations of intent are insufficient. *Cf. United States* v. *Consolidated Laundries Corp.*, 291 F.2d 563, 572 (2d Cir. 1961); *Blaine* v. *Meineke Discount Muffler Shops, Inc.*, 670 F. Supp. 1107, 1110-11 (D. Conn. 1987).

Discon now alleges in the Amended Complaint that:

> NYNEX Corp., NYT and MECo attempted to monopolize the markets for removal services at NYT and in the New York State area. NYT has market power by virtue of its local telephone monopoly. NYNEX Corp. and MECo specifically intended to use this market power to exclude competition from the markets for removal services. There was a dangerous probability that their attempt would succeed, and it did succeed.

Amended Complaint, ¶ 100.

The Amended Complaint does not contain the necessary allegations of specific intent to monopolize. Discon cannot save its attempted monopoly claim by adding a conclusory statement of specific intent to its prior claim of attempted monopoly. In order to withstand a motion to dismiss, Discon must allege some conduct permitting an inference of specific intent to monopolize. *Blaine*, 670 F. Supp. at 1110. Bare bones allegations without supporting facts cannot support its claim of specific intent. *See TV Communications Network, Inc.* v. *Turner Network Television, Inc.*, 964 F.2d 1022, 1026 (10th Cir.), *cert. denied*, 113 S. Ct. 601 (1992); *Heart Disease Research Found.* v. *General Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972). This is particularly true where, as here, Discon has already been given leave to amend its Complaint.

Discon's attempted monopolization claim also must fail because, as the Court already ruled, there cannot be a "dangerous probability" of monopolization if a defendant does not compete in the same market as plaintiff. Decision at 16-17; *Capital Imaging Assocs. P.C.* v. *Mohawk Valley Medical Assocs.*, 725 F. Supp. 669, 678 (N.D.N.Y. 1989) (where defendants do not compete in same market as plaintiff "not only is there no *dangerous probability* that defendants will succeed in monopolizing the markets identified by plaintiff, there is no present *possibility* defendants will do so.") (emphasis in original); *see International Distribution Centers, Inc.*, 812 F.2d at 790-91; *Nifty Foods Corp.*, 614 F.2d at 841; *Soap Opera Now, Inc.* v. *Network Publishing Corp.*, 737 F. Supp. 1338, 1347 & n.12 (S.D.N.Y. 1990) (no probability of defendant monopolizing a market in which it did not compete); *Theater Party Assocs., Inc.* v. *Shubert Org.*, 695 F. Supp. 150, 156 (S.D.N.Y. 1988).

The Court has already determined that the Amended Complaint has failed to allege that defendants compete in the same market as Discon. Rather, as previously stated, the Amended Complaint admits that NYT and MECo were purchasers of the network removal services supplied by Discon. *See* [p. 29a *supra*]. Thus, Discon cannot adequately allege a dangerous probability that defendants would succeed in attempting to monopolize network removal services at NYT and in the New York State area. Accordingly, there can be no viable attempt to monopolize claim, and the Court dismisses Discon's Section 2 claim for attempted monopolization.

2. Monopolization

The elements of monopolization under Section 2 are: "(1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Volvo N. Am. Corp.*, 857 F.2d at 73.

The Court dismissed Discon's monopolization claim in the Complaint because defendants did not participate as competitors in the same market as Discon. Complaint, at 14. (citing *FLM Collision Parts, Inc.* v. *Ford Motor Co.*, 543 F.2d 1019, 1030 (2d Cir. 1976) (Section 2 claim dismissed because defendant did not compete in relevant market), *cert. denied*, 429 U.S. 1097 (1977)).

The Amended Complaint attempts to correct this failing by alleging:

> NYT has market power by virtue of its local telephone monopoly. NYNEX Corp. and MECo specifically intended to use this market power to exclude

competition from the markets for removal services.

Amended Complaint, ¶ 100.

As the Court has previously stated, the Amended Complaint admits that MECo's "primary business function" is procuring goods and services for NYT and NET. Amended Complaint, ¶ 16. The fact that Discon and defendants did not participate in the same market as competitors is fatal to Discon's monopolization claim. *See Official Airline Guides, Inc.* v. *FTC*, 630 F.2d 920, 926 (2d Cir. 1980) (rejecting monopolization claim because defendant "is engaged in a different line of commerce" than the market allegedly affected), *cert. denied*, 450 U.S. 917 (1981); *FLM Collision Parts, Inc.*, 543 F.2d at 1030; *Addino* v. *Genesee Valley Medical Care*, 593 F. Supp. 892, 901 (W.D.N.Y. 1984) (alternative ground for dismissal of Section 2 claim was that defendant was not a competitor of plaintiffs); *see also*, *White* v. *Rockingham Radiologists, Ltd.*, 820 F.2d 98, 104-05 (4th Cir. 1987) (hospital and plaintiff neurologist did not compete); *Mercy-Peninsula Ambulance, Inc.* v. *County of San Mateo*, 791 F.2d 755, 759 (9th Cir. 1986) (rejecting ambulance company's challenge to a county's award of exclusive contract to competitor because county was not a competitor in the market for healthcare provision).

Nor has Discon set forth any allegation that defendants tried to enter the market for removal services or attempted to use NYT's position in the telephone service market to gain monopoly power in the removal services market.

Thus, for the reasons set forth, the Court dismisses Discon's Section 2 monopolization claim.

3. Conspiracy to Monopolize

The elements of a conspiracy to monopolize claim are: "(1) concerted action; (2) overt acts in furtherance of the conspiracy; and (3) specific intent to monopolize." *Volvo N. Am. Corp.*, 857 F.2d at 74. The Court dismissed Discon's conspiracy to monopolize claim in the Complaint because it failed to allege any concerted action and failed to allege specific intent to monopolize. Decision, at 17.

The Amended Complaint attempts to correct these deficiencies by listing the purported acts of the alleged conspiracy. Amended Complaint, ¶ 107. The Court has already determined that the acts alleged by Discon fail to exclude the possibility that NYNEX acted on its own. Thus plaintiff has failed to establish the first element of its conspiracy to monopolize claim. The failure to specify what concerted actions NYNEX and AT&T took to further their alleged goal requires dismissal. *Telectronics*, 687 F. Supp. at 837; *Eastway Constr. Corp.*, 762 F.2d at 250. Finally, the failure of Discon to allege specific intent to monopolize on the part of defendants also requires dismissal of its conspiracy to monopolize claim. *TV Communications Network, Inc.*, 964 F.2d at 1026; *Disease Research Found.*, 463 F.2d at 100.

Moreover, merely alleging that NYNEX and Technologies agreed that Technologies rather than Discon would provide network removal services for NYT is insufficient to state a claim under Section 1 of the Sherman Act. *Monsanto*, 465 U.S. at 761; *see also Burdett Sound, Inc.* v. *Altec Corp*, 515 F.2d 1245, 1249 (5th Cir. 1975) (No antitrust violation where a manufacturer contracts with a new distributor and terminates its relationship with former distributor, even if the effect of the new contract is to seriously damage the former

distributor's business). Discon cannot attempt to state a claim under Section 2 by merely attaching the label "conspiracy to monopolize" to the same conduct alleged under its Section 1 claim. *See Seagood Trading Corp.* v. *Jerrico Inc.*, 924 F.2d 1555, 1576 (11th Cir. 1991) (conspiracy to monopolize claim dismissed where it relied on same allegations as insufficient Section 1 claim); *see also American Tobacco Co.* v. *United States*, 328 U.S. 781, 788 (1946) ("Sections 1 and 2 of the Sherman Act require proof of conspiracies which are reciprocally distinguishable from and independent of each other although the objects of the conspiracy may partially overlap."); *Regency Oldsmobile, Inc.* v. *General Motors Corp.*, 723 F. Supp. 250, 269 (D.N.J. 1989) (dismissing Section 2 conspiracy claim and stating "[p]laintiff's conspiracy to monopolize claim appears to be its § 1 claim in disguise."). Accordingly, for the reasons set forth, Discon's conspiracy to monopolize claim is dismissed.

D. RICO Claims

The Fifth, Sixth and Seventh Counts of the Amended Complaint purport to allege that defendants are liable under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"). Amended Complaint, ¶¶ 114-141.

RICO provides a civil remedy for any person "injured in his business or property by reason of a violation of § 1962 of this chapter . . . ." 18 U.S.C. § 1964(c). Section 1962, in turn, is divided into four subsections each of which sets out a separate type of prohibited activity involving a "pattern of racketeering activity" or the collection of an unlawful debt. 18 U.S.C. § 1962. "Racketeering activity" is defined in the statute to include various federal and state criminal law offenses such as mail fraud, wire fraud, fraud in the sale of

securities, extortion and obstruction of justice. 18 U.S.C. § 1961(1). A "pattern of racketeering activity" consists of at least two predicate acts violating the criminal statutes listed in § 1961(1) within ten years of the claim, where the acts were related and amount to continuing criminal activity, or by their nature pose a likelihood of continuing criminal activity. *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989). Allegations that a defendant has engaged in predicate acts of racketeering activity are necessary prerequisites for stating a claim under any subsection of Section 1962.

The Court dismissed the Complaint because Discon had "failed to plead the predicate acts of mail fraud, wire fraud and fraud in the sale of securities with the particularity required under Fed. R. Civ. P. 9(b) and . . . failed to allege facts stating a claim under any of the subsections of § 1962." Decision, at 19.

In the Amended Complaint, Discon purports to plead predicate acts of mail and wire fraud, fraud in the sale of securities, extortion and obstruction of justice. The Court finds that the Amended Complaint fails to correct the deficiencies identified by the Court in its Decision. Despite representations to the Court that it had gathered evidence supporting all of its allegations, including contemporaneous records of defendants' wrongdoing, affidavits from former employees and records of proceedings in front of the New York State Public Service Commission, Decision, at 23, Discon has failed to meet the particularity requirements of Rule 9(b) when pleading the predicate acts of mail fraud, wire fraud and fraud in the sale of securities. Further, although Discon no longer sets forth a claim under 18 U.S.C. § 1962(a), the Amended Complaint, like the Complaint, fails to allege facts

stating a claim under Section 1962(b), (c) or (d). Thus, the Fifth, Sixth and Seventh Counts in the Amended Complaint are dismissed.

1. Pleading Fraud With Particularity Under Fed. R. Civ. P. 9(b)

Discon has alleged five fraud-based predicate acts. *See* Amended Complaint ¶¶69, 73, 83, 85, 86. With the exception of ¶73, these paragraphs set forth claims substantially similar to those alleged in the Complaint, which this Court has already determined failed to identify or describe the alleged predicate acts with the specificity required by Fed. R. Civ. P. 9(b). Decision, at 18-24.

Rule 9(b) provides, in pertinent part, that:

> In all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity. Malice, intent, knowledge and other conditions of mind may be averred generally.

"Rule 9(b) is designed to provide the defendant fair notice of the plaintiff's claims, and to enable the defendant to prepare a suitable defense, protect his reputation or good will from harm, and reduce the number of strike suits." *O'Brien* v. *Price Waterhouse*, 740 F. Supp. 276, 279 (S.D.N.Y. 1990), *aff'd sub. nom. O'Brien* v. *National Property Analysts Partners*, 936 F.2d 674 (2d Cir. 1991). Because of the potential harms attendant to being labelled a racketeer, these aims are even more compelling in civil RICO actions. *See Lou* v. *Belzberg*, 728 F. Supp. 1010, 1024 (S.D.N.Y. 1990); *Philan Ins. Ltd.* v. *Frank B. Hall & Co.*, 712 F. Supp. 339, 344 (S.D.N.Y. 1989); *Harrison* v. *Enventure Capital Group*, 666 F. Supp. 473, 478 (W.D.N.Y. 1987).

The Second Circuit has imposed stringent pleading requirements on plaintiffs who make allegations of fraud. "[T]he 'complaint must adequately specify the statements it claims were false or misleading, give particulars as to the respect in which plaintiff[ ] contend[s] the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements.'" *McLaughlin* v. *Arthur Anderson*, 962 F.2d 187, 191 (2d Cir. 1992) (quoting *Cosmas* v. *Hassett*, 886 F.2d 8, 11 (2d Cir. 1989)); *see also DiVittorio* v. *Equidyne Extractive Indus.*, 822 F.2d 1242, 1247 (2d Cir. 1987) (plaintiffs must specify the "time, place, speaker and content of the alleged misrepresentations."); *Luce* v. *Edelstein*, 802 F.2d 49, 54 (2d Cir. 1986). A plaintiff asserting mail fraud also must identify the purpose of the mailing within the defendant's fraudulent scheme. *McLaughlin*, 962 F.2d at 191 (citations omitted).

Further, the plaintiff must supply a factual basis for allegations of scienter that "give rise to a 'strong inference' that the defendants possessed the requisite fraudulent intent." *Beck* v. *Manufacturers Hanover Trust Co.*, 820 F.2d 46, 50 (2d Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988), *overruled on other grounds*, *United States* v. *Indelicato*, 865 F.2d 1370 (2d Cir. 1989) (en banc). The allegations must show a motive and a clear opportunity for committing fraud, or circumstances clearly indicating conscious participation in the fraud. *Beck*, 820 F.2d at 50; *O'Brien* v. *National Property Analysts Partners*, 719 F. Supp. 222, 226 (S.D.N.Y. 1989).

Where multiple defendants are charged, "the complaint should inform each defendant of the nature of his alleged participation in the fraud." *DiVittorio*, 822 F.2d at 1247. "[T]he wholesale naming of directors and officers of corporations without any indication of the role of the individual

defendants'' is not enough. *The Limited Inc.* v. *McCrory Corp.*, 645 F. Supp. 1038, 1043 n.10 (S.D.N.Y. 1986). Instead, ''specific allegations must be made with respect to each particular individual.'' *Leslie* v. *Minson*, 679 F. Supp. 280, 284 (S. D. N.Y. 1988).

In order to state a claim of mail fraud, plaintiff must allege: (1) the existence of a scheme to defraud; (2) defendants' knowing or intentional participation in that scheme; and (3) use of the interstate mails in furtherance of the scheme. *Beck*, 820 F.2d at 49.[5]

In addition, Rule 9(b) requires that the complaint allege specific facts that support any conclusory allegations that the misstatements complained of were intentionally fraudulent. *Beck*, 820 F.2d at 50.

Discon alleges that the predicate acts of racketeering included mail fraud, wire fraud and securities fraud. Amended Complaint, ¶¶ 69, 73, 83, 85, 86. The charges contained in each of these paragraphs fail to meet the particularity requirements of Rule 9(b). For example, ¶ 69 alleges that NYNEX Corp. and Eckenrode caused NYT to make a fraudulent transfer of more than $3 million in payments to an attorney. Plaintiff fails to specify when and where the transfer occurred or to whom the transfer was made, the manner in which the transfer was fraudulent or the purpose of the transfer in defendants' fraudulent scheme. *McLaughlin*, 962 F.2d at 192.

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5. Wire fraud is identical to mail fraud except for the substitution of use of interstate wire communications for use of the mails. *U.S. Soccer Properties, Inc.* v. *Aegis Group PLC*, 1992 U.S. Dist. LEXIS 11513, at *31 (S.D.N.Y. Aug. 4, 1992).

Discon purports to allege a scheme to defraud ratepayers including acts of racketeering associated with marking up and processing Discon's invoices and alleges approximately 80 acts of mail fraud and 90 acts of wire fraud. Amended Complaint ¶ 73. Discon fails, however, to provide any specific information regarding the alleged frauds. Instead, it has compiled a list of invoices, sent primarily from Discon to MECo, and resulting wire communications. Discon fails to identify what specific statements were made, the manner in which the statements were false or misleading, their connection or relation to particular defendants or the purpose of the mailings or transfers in the fraudulent scheme. *Id.* In the absence of any facts indicating that the invoices contained misrepresentations or were false or misleading, there is no indication that the invoices served any function other than to present a request for payment. Without more, Discon cannot allege mail or wire fraud based on the mailing of these invoices or the wire transfers. *O'Malley* v. *New York City Transit Auth.*, 896 F.2d 704, 707 (2d Cir. 1990) (''routine, innocuous, business communications'' cannot form the basis for a mail fraud charge); *Atlantic Gypsum Co.* v. *Lloyds Int'l Corp.*, 753 F. Supp. 505, 512 (S.D.N.Y. 1990) (dismissing complaint where paragraphs ''consist of little more than string citations to business communications on particular dates, whose contents even as described in the complaint seem unremarkable''; and where the paragraphs do not set forth the contents of any alleged misrepresentation) (quoting *DiVittorio* v. *Equidyne Extractive Indus.*, 822 F.2d 1242, 1247 (2d Cir. 1987)). Thus, the Amended Complaint fails to allege any predicate acts of mail fraud or wire fraud with the requisite particularity.

As to the alleged instances of securities fraud, *see* Amended Complaint, ¶¶ 83, 85, 86, Discon fails to identify

any statement in any particular report that was rendered misleading by the alleged omissions. Moreover, Discon has failed to set forth any reason why the allegedly false statements or omissions were fraudulent. Thus, the Amended Complaint fails to allege any predicate acts of fraud in the sale of securities with the requisite particularity.

The Court notes that Discon's claims for mail fraud, wire fraud and fraud in the sale of securities in the Complaint were dismissed for substantially the same reasons, in spite of the fact that Discon was put on notice as to what was required to plead properly its claims under the RICO statute. Decision, at 22-24.

Moreover, the allegations of fraud contained in the Amended Complaint do not allege the essential element of deception. The mail fraud statute requires some element of deception. *McLaughlin*, 962 F.2d at 192. This element is satisfied "where the mailing itself is misleading or where there is some other deception which the mailing serves." *Id.* at 193. None of the five fraud-based allegations alleges any deception directed at Discon. A RICO claim cannot be based on deception of others.

2. Extortion

Discon purports to allege predicate acts of extortion in violation of the Hobbs Act. Discon alleges that defendants forced it to accept obligations outside its contract, to "salt" scrap, and to "remove wire spring relays from scrap sold to AMAX (Copper)." Amended Complaint ¶¶ 38, 74, 75. Discon also alleges that defendants put it in fear of economic loss unless it participated in "unlawful conspiracies." Amended Complaint ¶ 89. In addition, Discon alleges acts of extortion by defendants that did not involve Discon or cause it any

injury. Amended Complaint ¶ 88.

In *Agency Holding Corp.* v. *Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 152 (1987), the Supreme Court held that the four-year statute of limitations of the Clayton Act applies in all civil RICO actions. The Complaint in this action was filed on May 25, 1990. Thus, the purported Hobbs Act violations that occurred more than four years prior to the filing of the Complaint must be dismissed as time barred.[6]

With respect to the remaining act of extortion, Discon alleges that a MECo employee told Faltisco, on September 8, 1986, that he would not be allowed to work for MECo or NYT unless he signed a release and returned evidence of the illegal markups. Amended Complaint, ¶ 56. The Court dismisses this allegation as Discon has failed to allege an "obtaining of property" as required by 18 U.S.C. § 1951(b)(2). At most, the conduct alleged by Discon amounts to threats to terminate or to refuse to rehire Discon as a NYT supplier. Under the terms of the contract between NYNEX and Discon, NYNEX had the right to terminate or refuse to rehire Discon. *See* Amended Complaint, Exhibit 1. "The threat to do that which one is contractually permitted to do is not extortion, and cannot possibly fall within any imaginable criminal definition of extortion." *Zaro Licensing, Inc.* v. *Cinmar, Inc.*, 779 F. Supp. 276, 283 (S.D.N.Y. 1991) (citations omitted).

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6. These include Amended Complaint ¶ 38, undated; ¶ 74, September 1984; ¶ 75, November 2, 1984; ¶ 77, incorporating purported acts of extortion occurring on June 19, 1984; ¶ 89, incorporating above paragraphs.

3. Obstruction of Justice

It is an obstruction of the due administration of justice intentionally to influence or injure a juror or officer "in or of any court of the United States." 18 U.S.C. § 1503. To constitute an offense under this statute, the act must relate to a proceeding in a federal court of the United States. *Id.*; *O'Malley*, 896 F.2d at 707 (citing *United States* v. *Biaggi*, 853 F.2d 89, 104 (2d Cir. 1988)).

Each of the acts of obstruction of justice alleged in the Amended Complaint involve payments on the part of defendants to unspecified former employees and to Lawrence Friedman. Amended Complaint ¶¶ 91-94. There is no allegation that these payments relate to a federal court proceeding as required by § 1503. Thus, the Court dismisses Discon's obstruction of justice claim pursuant to 18 U.S.C. § 1503. Nor is obstruction of justice included as one of the generic state law crimes set forth in 18 U.S.C. § 1961(1)(A). *Id.*

4. No Standing as Ratepayer

Discon alleges that the conduct of NYNEX's affairs through a pattern of racketeering caused it to pay higher regulated telephone rates in an undetermined amount believed to be in excess of $1,800.00. Amended Complaint, ¶¶ 124, 135.

The Second Circuit has recently decided that suits by ratepayers brought pursuant to the civil RICO provisions are barred by the filed rate doctrine. *Wegoland Ltd.* v. *NYNEX Corp.*, 27 F.3d 17 (2d Cir. 1994). Thus, Discon cannot maintain its RICO claims against defendants based on its standing as a ratepayer. Accordingly, to the extent Discon alleges injury as a ratepayer due to the alleged fraud of defendants, those claims are dismissed.

5. Section 1962(b) Claim

The Sixth Count of the Amended Complaint purports to allege that NYNEX, MECo and Eckenrode violated 18 U.S.C. § 1962(b) by maintaining an interest in and control of NYT through a pattern of racketeering activity. Section 1962(b) states that it is unlawful to acquire or maintain an interest in, or control of, an enterprise through a pattern of racketeering activity or collection of an unlawful debt. 18 U.S.C. § 1962(b).

Discon's Section 1962(b) claim in the Amended Complaint is substantially the same as the claim in its Complaint, which the Court dismissed as time-barred. *See* Decision, at 25; *Agency Holding Corp.*, 483 U.S. at 152.

Although Discon purports to allege in the Amended Complaint that NYNEX maintained control of NYT through actions occurring after May 20, 1986, it does not dispute that NYNEX acquired its control or interest in NYT upon the divestiture of AT&T on January 1, 1984. Complaint, ¶23; Amended Complaint, ¶21, and that all acts required for the acquisition and maintenance of control of NYT occurred on January 1, 1984, more than four years before the filing of the Complaint.

In addition, Discon has failed to assert any injury as a result of defendants' maintenance of control of NYT that is independent or distinct from the predicate acts themselves. *Danielsen* v. *Burnside-Ott Aviation Training Ctr., Inc.*, 941 F.2d 1220, 1231 (D.C. Cir. 1991) (plaintiff must allege an "acquisition" injury, analogous to "the use or investment injury" required under § 1962(a) to show injury by reason of a § 1962(b) violation.) (citing *Old Time Enterprises, Inc.* v. *International Coffee Corp.*, 862 F.2d 1213, 1219 (5th Cir.

1989)); *see also Litton Indus. Inc.* v. *Lehman Bros. Kuhn Loeb, Inc.*, 709 F. Supp. 438, 452 (S.D.N.Y. 1989) (dismissing § 1962(b) claim for failure to establish "causal connection between defendants' interest or control and [plaintiff's] injuries"), *rev'd on other grounds*, 967 F.2d 742 (2d Cir. 1992). Thus, for the reasons stated, Discon has failed to state a claim under Section 1962(b).

6. Section 1962(c) Claim

The Fifth Count of the Amended Complaint purports to allege that NYNEX Corp., MECo, NYT, Eckenrode and O'Reilly conducted and participated in the affairs of NYNEX through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c). Amended Complaint, ¶ 116.

To state a claim under Section 1962(c), a plaintiff must allege that the "persons" committing the RICO violation were distinct from the "enterprise" conducted unlawfully. *Bennett* v. *United States Trust Co.*, 770 F.2d 308, 315 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986).

The Second Circuit has recently held that a plaintiff cannot state a claim under Section 1962(c) and circumvent the distinctness requirement "by alleging a RICO enterprise that consists merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant . . . ." *Riverwoods Chappaqua* v. *Marine Midland Bank*, 30 F.3d 339, 344 (2d Cir. 1994).

Here, Discon alleges that NYNEX Corp., MECo, NYT, Eckenrode and O'Reilly were "persons" participating in the affairs of the "enterprise," NYNEX, which includes NYNEX Corp. and each of its subsidiaries. Amended Complaint ¶¶ 115, 116. Because NYNEX owns MECo and NYT, Eckenrode is employed by NYNEX, and O'Reilly is employed by

MECO, there is complete identity between the "persons" and "enterprise" alleged. Thus, pursuant to *Riverwoods Chappaqua*, Discon's Section 1962(c) claim is dismissed. Unlike Discon's Section 1962(c) claim in the Complaint, this is not a situation "[w]here the overlap between the defendants and the alleged RICO enterprise is only partial . . . ." *Jacobson* v. *Cooper*, 882 F.2d 717, 720 (2d Cir. 1989); Decision, at 28.

7. Section 1962(d) Claim

The Seventh Count of the Amended Complaint purports to allege that defendants conspired and agreed to violate 18 U.S.C. § 1962(b) and (c), in violation of 18 U.S.C. § 1962(d). Amended Complaint, ¶¶ 137, 138.

First, Discon's RICO conspiracy claim must be dismissed because a claim cannot be made under § 1962(d) in the absence of stating a viable claim under § 1962(a), (b) or (c). *Leonard* v. *Shearson Lehman/Am. Express, Inc.*, 687 F. Supp. 177, 182 (E.D. Pa. 1988); *see also*, *Danielsen*, 941 F.2d at 1232. Since Discon's Sections 1962(b) and (c) claims have been dismissed for the reasons explained above, its § 1962(d) claim must necessarily fail.

Second, the Amended Complaint, like the Complaint, fails to specifically allege that defendants agreed to commit specific predicate acts. Decision, at 29, citing *Hecht* v. *Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990). Because Discon has failed to allege a factual basis for finding an agreement among defendants, its Section 1962(d) claim must be dismissed. *Id.*, at 26 n.4.

E. Failure to Comply with Fed. R. Civ. P. 8(a)

Fed. R. Civ. P. 8(a) requires that "[a] pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."

The Court dismissed Discon's Complaint under Rule 8(a) stating that the "Complaint lacks any coherent organization and is unduly confusing and lengthy." Decision, at 38. Although there may have been some attempt by Discon to match the more than ninety paragraphs of factual allegations to its claims, the Amended Complaint, like the Complaint, is unduly confusing and lengthy and does not provide a clear and succinct statement of the claims. Accordingly, although defendants did not move for dismissal of the Amended Complaint under Rule 8(a), the Court finds that the Amended Complaint also should be dismissed for failure to comply with the requirements of Rule 8(a).

F. Dismissal of Plaintiff's State Law Claims

The Court's only basis of jurisdiction over Discon's state law claims is pendent jurisdiction.[7] As all of Discon's federal claims have been dismissed, the Court will exercise its discretion and decline to retain jurisdiction over Discon's state law claims. *Finley* v. *United States*, 490 U.S. 545 (1989); *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966). Discon's state law claims are hereby dismissed pursuant to Fed. R. Civ. P. 12(b)(1).

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7. Because the Complaint was filed prior to December 1, 1990, the Court does not have jurisdiction based on supplemental jurisdiction, 28 U.S.C. § 1367.

G. Dismissal of Plaintiff's Federal Claims with Prejudice

Fed. R. Civ. P. 15(a) requires that "leave [to amend the complaint] shall be freely given when justice so requires." Rule 15(a) has been interpreted liberally, allowing for amendment unless circumstances exist such as "'undue delay, bad faith, futility of the amendment, and perhaps the most important, the resulting prejudice to the opposing party.'" *Richardson Greenshields Secur., Inc.* v. *Lau*, 825 F.2d 647, 653 n.6 (2d Cir. 1987) (quoting *State Teachers Retirement Bd.* v. *Fluor Corp.*, 654 F.2d 843, 856 (2d Cir. 1981)). If the district court does exercise its discretion to dismiss the complaint with prejudice, "refusal to grant leave must be based on a valid ground." *O'Brien*, 740 F. Supp. at 284 (quoting *Ronzani* v. *Sanofi S.A.*, 899 F.2d 195, 198 (2d Cir. 1990)).

The Court finds that dismissal of Discon's federal law claims against defendants should be with prejudice. Discon has already been granted one opportunity to amend its Complaint, and has failed to satisfy the requirements of Rules 9(b) and 12(b)(6), as well as Rule 8(a). The superficial nature of Discon's amendments, *e.g.*, adding labels and conclusory allegations to the same core claims contained in the Complaint, leads the Court to believe that a third pleading would merely duplicate the failings that have twice resulted in dismissal. Based on the expected futility of an additional amendment and on the costs and potential prejudice to defendants, the Court will not grant Discon the opportunity to file a third pleading in this case. *Posner* v. *Coopers & Lybrand*, 92 F.R.D. 765, 770 (S.D.N.Y. 1981), *aff'd*, 697 F.2d 296 (2d Cir. 1982) (dismissal with prejudice of amended complaint proper when court put plaintiff on notice of the deficiencies of the initial complaint and plaintiff failed to correct them in the amended pleading).

CONCLUSION

For the reasons stated, defendants' motion to dismiss the Amended Complaint for failure to state a claim is granted. Discon's claims brought pursuant to the Sherman Act, 15 U.S.C. §§ 1 and 2 and RICO, 18 U.S.C. § 1961 et seq., are dismissed with prejudice. The Court declines to exercise its discretion to retain jurisdiction over Discon's state law claims. Accordingly, the state law claims are dismissed for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). Defendants' motion for sanctions pursuant to Fed. R. Civ. P. 11 is denied.

IT IS HEREBY ORDERED that plaintiff's Attempt to Monopolize, Monopolization, and Conspiracy to Monopolize claims are dismissed, with prejudice.

FURTHER, that plaintiff's Restraint of Trade, RICO Conduct Enterprise, RICO Controlled Enterprise, and RICO Conspiracy claims are dismissed, with prejudice.

FURTHER, that plaintiff's state law claims based on the Donnelly Act, Prima Facie Tort, Breach of Contract, Common Law Defamation, and Civil Conspiracy, are dismissed pursuant to Fed. R. Civ. P. 12(b)(1).

FURTHER, that defendants' motion pursuant to Fed. R. Civ. P. 11 is denied.

FURTHER, that the Clerk of the Court is directed to enter judgment in favor of defendants.

IT IS SO ORDERED.

/s/ RICHARD J. ARCARA
HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT COURT

Dated: June 7 , 1995

Order of the Court of Appeals Denying Rehearing

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 7th day of January one thousand nine hundred and ninety-

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Discon Incorporated

Plaintiff-Appellant,

v.

Nynex Corporation

Defendant-Appellee

Dkt No: 95-7673

[SEAL
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
JAN - 7 1997
GEORGE LANGE III, CLERK]

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellee Nynex Corporation, et al.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

Order Denying Rehearing

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: /s/ BETH J. MEADOR
Beth J. Meador,
Administrative Attorney